Supreme Court, U.S.
FILED

184 (1) 101294 APR 21 2011

OFFICE OF THE CLERK

No. 11-___

IN THE
Supreme Court of the United States

IVOR G. LUKE,
Hospital Corpsman Second Class,
United States Navy,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Michael R. Torrisi
Lieutenant, JAGC, USN
1254 Charles Morris
Street, SE
Washington, D.C. 20374
(202) 685-7295

David P. Sheldon
Counsel of Record
Brian D. Schenk
Law Offices of David P.
Sheldon
512 Eighth Street, SE
Washington, D.C. 20003
(202) 546-9575

QUESTION PRESENTED

Does the decision of the Court of Appeals for the Armed Forces (CAAF) violate this Court's holding in *Mesarosh v. United States* by disregarding its governing principles that post-trial information can so discredit the credibility of a principal government witness that it undermines the integrity of the judicial process?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT OF THE CASE 2
I. Introduction 2
II. Legal Framework 3
REASONS FOR GRANTING THE PETITION 5
I. The Circuits Are Divided on the Proper Application of this Court's Holding in *Mesarosh v. United States* 5
II. The CAAF Violated this Court's Holding in *Mesarosh v. United States* 9
CONCLUSION 12
APPENDIX 1a
2011 CAAF Decision 1a
2009 NMCCA Decision 50a
2006 CAAF Decision 70a

TABLE OF AUTHORITIES

Cases

Mesarosh v. United States, 352 U.S. 1 (1956) . passim

United States v. Badger, 983 F.2d 1443 (7th Cir. 1993) 7, 9

United States v. Berry, 624 F.3d 1031 (9th Cir. 2010) 7

United States v. Brooks, 49 M.J. 64 (C.A.A.F. 1998). 3, 4, 6

United States v. Brunoehler, 714 F.2d 99 (11th Cir. 1983) 8

United States v. Burns, 495 F.3d 813 (8th Cir. 2007) 8

United States v. Garcia, 19 F.3d 1123 (6th Cir. 1994) 6

United States v. Luke, 63 M.J. 60 (C.A.A.F. 2006) 1, 2

United States v. Luke, 69 M.J. 309 (C.A.A.F. 2011) ....passim

United States v. Miller, 59 F.3d 417 (3d Cir. 1995) .. 8

United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975) 8

United States v. Taglia, 922 F.2d 413 (7th Cir. 1991) 8, 9

United States v. Wright, 625 F.2d 1017 (1st Cir. 1980) 6

Statutes

10 U.S.C. § 873 (2006) 1, 3, 4, 5, 6

10 U.S.C. § 934 (1999) 2

Rules

FED. R. CRIM. P. 33 5

RULE FOR COURTS-MARTIAL 1210 1,3,4

PETITION FOR A WRIT OF CERTIORARI

Hospital Corpsman Second Class Ivor G. Luke, United States Navy, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces (CAAF) in this case.

OPINIONS BELOW

The 2011 opinion of the CAAF (App., *infra*, 1a-49a) is reported at 69 M.J. 309. The 2009 unpublished opinion of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) (App., *infra*, 50a-69a) is reported at 2009 CCA LEXIS 270. The 2006 opinion of the CAAF (App., *infra*, 70a-83a) is reported at 63 M.J. 60. The 2004 unpublished opinion of the NMCCA is reported at 2004 CCA LEXIS 218.

JURISDICTION

The CAAF entered its opinion on January 25, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Articles 73 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 873, 934, Rule

for Courts-Martial 1210, Federal Rule of Criminal Procedure 33.

STATEMENT OF THE CASE

I. Introduction

Hospital Corpsman Second Class Ivor G. Luke (Petty Officer Luke) was convicted by a general court-martial of two specifications of indecent assault, in violation of Article 134, UCMJ.[1] On September 28, 2004, the NMCCA affirmed the findings and sentence as approved by the convening authority. On August 25, 2005, the United States Army Criminal Investigations Laboratory (USACIL) disclosed that Phillip Mills, a forensic expert who analyzed the physical evidence in Petty Officer Luke's case and testified against him at trial, had been suspended due to improper practices at the lab. Mr. Mills's suspension, which ultimately led Mr. Mills to resign to avoid firing, was the result of a Government investigation conducted several years after Petty Officer Luke's trial. The investigation found widespread misconduct and deficiencies in the performance of Mr. Mills's forensic duties.

On April 7, 2006, CAAF set aside NMCCA's decision and returned the record to the Judge Advocate General of the Navy for a fact-finding hearing pursuant to *United States v. Dubay*.[2] After this June 2006 hearing, CAAF remanded Luke's case to the NMCCA for further consideration in light of

---

[1] 10 U.S.C. § 934 (2000).

[2] *United States v. Luke*, 63 M.J. 60, 63 (C.A.A.F. 2006).

the *Dubay* hearing.

In May 2008, the lower court ordered a second *Dubay* hearing in light of the Government's continued non-compliance with an evidence production order. After the second *Dubay* hearing, the NMCCA affirmed the findings and sentence in Luke's case on July 31, 2009. The CAAF again granted review and, on January 25, 2011, affirmed the decision of the NMCCA. With regard to the newly discovered evidence of the misconduct of a government witness, the majority relied solely on the standard set forth in *United States v. Brooks*, which requires an evaluation of "whether the newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result of the accused."[3] The CAAF did not apply the principles of this Court's holding in *Mesarosh v. United States*, which applies in cases where post-trial information so discredits the credibility of a principle government witness that it undermines the integrity of criminal trials in federal courts.[4]

II. Legal Framework

Generally, when new physical or testimonial evidence is discovered after conviction of a service member, the Rules for Courts-Martial (RCM) set out a three-part test to determine whether a new trial

---

[3] *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998) (applying guidelines set forth in the Rules for Courts-Martial 1210(f)(2)(c)).

[4] *Mesarosh v. United States*, 352 U.S. 1, 3, 9 (1956).

shall be granted.[5] The reviewing court examines (1) whether the evidence was discovered after the trial, (2) if the evidence would not have been discovered by the petitioner at the time of trail in the exercise of due diligence, and (3) whether the newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.[6]

But in *Mesarosh*, this Court articulated an additional governing principle for the rare case where the government admits that one of its central witnesses has provided unreliable and inaccurate testimony. In *Mesarosh*, the government presented information that wholly discredited a government witness's credibility in unrelated proceedings. And because the credibility of the government witness implicated the "integrity of . . . criminal trial[s] in the federal court," Mesarosh's conviction was set aside.[7] The integrity of criminal trials in the military is similarly threatened here, therefore this additional analysis is necessary—especially since Petitioner's conviction rests largely on the opinion testimony of the discredited expert.

While appellate courts, and in particular CAAF, have applied the general test for determining whether to grant a new trial based on newly discovered evidence, they have had difficulty applying the unique considerations of *Mesarosh,* or neglected to engage in the analysis altogether when

---

[5] RULE FOR COURTS-MARTIAL 1210(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); 10 U.S.C. § 873 (2006).

[6] *Brooks*, 49 M.J. at 69; RCM 1210(f)(2); 10 U.S.C. § 873.

[7] *Mesarosh*, 352 U.S. at 3, 9.

presented with a wholly discredited government witness. When exclusively applied in cases where a central government witness's credibility is seriously undermined, the general test conflicts with this Court's precedent for determining whether to grant a new trial. Additionally, this case is of significant public importance as appellate courts require guidance as to how to apply this Court's precedential standard in *Mesarosh*.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided on the Proper Application of this Court's Holding in *Mesarosh v. United States*.

Under both the Rules for Courts-Martial (RCM) and the Rules for Federal Criminal Procedure, defendants may move for a new trial based on newly discovered evidence.[8] Under the RCM, generally,[9] the defendant must show that (1) the evidence was discovered after trial, (2) the evidence could not have been discovered by the

---

[8] 10 U.S.C. § 873; FED. R. CRIM. P. 33.

[9] Under the Rules for Federal Criminal Procedure, the reviewing court applies substantially the same test. The reviewing court considers an additional element of whether the evidence is material and not merely cumulative or impeaching; further, the court considers whether the new evidence will probably produce an acquittal, rather than a substantially more favorable result. *E.g. United States v. Garcia*, 19 F.3d 1123, 1126 (6th Cir. 1994); *United States v. Wright*, 625 F.2d 1017, 1019 (1st Cir. 1980).

petitioner at the time of trial through the exercise of due diligence, and (3) the newly discovered evidence, if considered, would probably produce a substantially more favorable result for the accused.[10]

This Court has established additional analysis for the reviewing court to consider when the post-trial information so undermines the credibility of a principal government witness that it undercuts the integrity of the government's case and the judicial process. In *Mesarosh v. United States*, this Court acknowledged certain unique circumstances in which the credibility of important government witnesses implicates the integrity of the judicial process.[11] Under these circumstances, only a judicial body equivalent to the original finder of fact may determine what it would do on a different body of evidence.[12]

There has been little uniformity in the application of *Mesarosh*. And the disagreement among the CAAF's judges here is emblematic of the inconsistent application of *Mesarosh* in appellate courts across the country. The CAAF judges could not agree whether *Mesarosh* applied or if the general analysis for newly discovered evidence was sufficient. [13] Given that Mr. Mills was involved in

---

[10] *Brooks*, 49 M.J. at 69; 10 U.S.C. § 873.

[11] *Mesarosh*, 352 U.S. at 5–6.

[12] *Id.* at 6.

[13] *Compare United States v. Luke*, 69 M.J. 309, 318 n. 14 (C.A.A.F. 2011)(rejecting the application of *Mesarosh* because the majority was "satisfied with the procedures traditionally utilized . . . to review cases presenting newly discovered evidence. . . .") *with Luke*, 69 M.J. at 324 (Effron, C.J., dissenting)(arguing that the CAAF must take into consideration the principles of *Mesarosh*).

hundreds of cases,[14] the CAAF could potentially face a significant number of similar appeals invoking the principles of *Mesarosh*. Thus, within the CAAF alone, the need for consistency is imperative.

Likewise, other circuit court judges have applied *Mesarosh* in a number of divergent and conflicting manners. For example, the Ninth Circuit[15] and the Seventh Circuit[16] have reached different conclusions as to whether the testimony in question must be wholly discredited in order to invoke *Mesarosh* analysis. In *U.S. v. Berry*, the Ninth Circuit concluded that in order to invoke *Mesarosh* analysis, the testimony in question must have been wholly discredited after trial.[17] But the Seventh Circuit in *U.S. v. Badger* used a standard requiring that the testimony be clearly inconsistent with the evidence discovered after trial.[18] This represents a substantial difference in analysis as one standard is much higher than the other and will potentially lead to substantially different analysis and results.

Additionally, appellate courts have considered different factors to be relevant to analysis under *Mesarosh*. In *U.S. v. Miller*, the Third Circuit considered the government's admission that its witness committed perjury relevant to its *Mesarosh*

---

[14] *Luke*, 69 M.J. at 313 n. 7 ("[T]he [USACIL] began a remediation project to review/retest 465 cases on which Mills had worked between 1995 and 2005.")

[15] *United States v. Berry*, 624 F.3d 1031 (9th Cir. 2010).

[16] *United States v. Badger*, 983 F.2d 1443 (7th Cir. 1993).

[17] *Berry*, 624 F.3d at 1043.

[18] *Badger*, 983 F.2d at 1457.

analysis.[19] While it is unclear whether government admission of the unreliability of the essential witness's testimony is a key factor under *Mesarosh*, the Third Circuit has analyzed it as such, whereas other circuit courts have not engaged in this same analysis. Furthermore, the Eighth Circuit has held that in order for *Mesarosh* to apply, the testimony must have been brought into question due to accusations of perjury,[20] as opposed to other disqualifying acts.[21] This application has the potential to lead to substantially different results as *Mesarosh* will have a much more limited application if it only applies to cases in which the witness committed perjury.

Lastly, whereas the Eleventh Circuit has determined that the application of *Mesarosh* largely turns on whether the issue of falsity and tainted evidence was presented to the jury,[22] other circuit courts have failed to apply any additional analysis under *Mesarosh*.[23] Similar to the approach of the CAAF, the Second Circuit[24] and the Seventh Circuit have held that no additional analysis is required under *Mesarosh* at all.[25] This underscores the

---

[19] *United States v. Miller*, 59 F.3d 417, 422–23 (3d Cir. 1995).

[20] *United States v. Burns*, 495 F.3d 873, 874–75 (8th Cir. 2007).

[21] For example, in the immediate case where the expert witness was found to be incompetent.

[22] *United States v. Brunoehler*, 714 F.2d 99, 101 (11th Cir. 1983).

[23] *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991); *United States v. Stofsky*, 527 F.2d 237, 246 (2d Cir. 1975).

[24] *Stofsky*, 527 F.2d at 246.

[25] In factually similar cases, the Seventh Circuit has both applied additional *Mesarosh* analysis and found that additional analysis under *Mesarosh* is unnecessary because the traditional

fundamental difficulty appellate courts have had in applying *Mesarosh*.

The *Mesarosh* analyses of the circuits has been largely divergent and inconsistent, leading to potentially significantly different results. Some circuit courts fail to apply any *Mesarosh* analysis, while others consider various factors giving different considerations different weight. The lower courts are in great need of guidance as to when and how to apply this Court's ruling in *Mesarosh*.

II. The CAAF Violated this Court's Holding in *Mesarosh v. United States*.

Petitioner was convicted by a general court-martial on February 22, 1999. The NMCCA affirmed this conviction on September 28, 2004. However, one year later in August 2005, the USACIL disclosed that Phillip Mills, one of the government's expert witnesses, had been suspended due to improper practices at the lab. After two *Dubay* hearings and several internal investigations, the USACIL uncovered substantial evidence of dishonesty, sloppiness and incompetence in Mills's work. Further, an outside auditor from Pennsylvania State University found that Mills exhibited intellectual dishonesty and confirmatory bias and the head of Quality Assurance at USACIL, Michael Auvdel, described Mills as suffering from an integrity problem that no corrective action could fix. Mills's

---

examination of newly discovered evidence is sufficient. *Compare Taglia*, 922 F.2d at 415 *with Badger*, 983 F.2d at 1457.

pattern of misconduct included, but was not limited to: the cross-contamination of evidence samples, the fabrication of results, incorrect analysis of evidence, and concealment of his own errors. USACIL's internal investigation classified Mr. Mills's misconduct as a Class I violation of the lab's procedures. Such a violation, according to USACIL, "raise[s] immediate concerns regarding the integrity of the laboratory's work product" and would be likely to "unfairly jeopardize the rights of an individual."

Despite the numerous findings undermining the integrity of the Mills's "expert" analysis and testimony and the government's own admission that Mills had displayed a pattern of errors, the majority at CAAF found that the newly discovered evidence of Mills's extreme patterns of misconduct would probably not produce a substantially more favorable result for petitioner. The Court instead focused on the importance of the testimony of the DNA analyst and discounted Mills's pattern of incompetence and cross-contamination of evidence. The majority in *Luke* mentioned *Mesarosh* only briefly in a footnote and did not engage in any discussion of the dissent's argument that *Mesarosh* applied.[26]

As discussed by Chief Judge Effron in his dissent, this Court's ruling in *Mesarosh* indicates that when the integrity and honesty of an essential government witness is greatly undermined, this may undermine the entire judicial process.[27] Chief Judge Effron noted Mills's history of incompetence, cross-contamination, and violation of laboratory protocols

---

[26] *Luke*, 69 M.J. at 318, n. 14.

[27] *Id.* at 324 (Effron, C.J., dissenting).

as "[underscoring] the potential for contamination of [Petitioner's] evidence in the present case."[28] He concluded that this misconduct undermined the integrity of the conviction and that, as established by *Mesarosh*, the original finder of fact is the only body which can adequately determine the outcome on a different body of evidence.[29] As the original finder of fact was a court-martial, only a court-martial can determine a verdict in light of Mills's incompetence. Chief Judge Effron recognized the unique importance of Mills's expert testimony in light of the little evidence offered against Luke at the court-martial.[30] Mills was one of very few witnesses and he was essential to the government's case against Luke.

The circumstances in this case are like those before this Court in *Mesarosh*. Both cases involve post-trial findings that an important government witness was wholly discredited. As the majority did not engage in any *Mesarosh* analysis despite the unique circumstances, the CAAF's test for whether newly discovered evidence warrants a new trial thus conflicts with this Court's precedent. Once the government has admitted that a government witness's testimony was unreliable and faulty in the present or other cases, the CAAF must engage in additional analysis under *Mesarosh*.

---

[28] *Id.*
[29] *Id.*
[30] *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David P. Sheldon
Counsel of Record
Brian D. Schenk
Law Offices of David P. Sheldon
512 Eighth St, SE
Washington, D.C. 20003
(202) 546-9575

Michael R. Torrisi
Lieutenant, JAGC, USN
1254 Charles Morris St, SE
Washington, D.C. 20374
(202) 685-7295

UNITED STATES, Appellee v. Ivor G. LUKE, Hospital Corpsman Second Class, U.S. Navy, Appellant

No. 05-0157

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

69 M.J. 309; 2011 CAAF LEXIS 78

October 4, 2010, Argued
January 25, 2011, Decided

Military Judge: Charles A. Porter.
United States v. Luke, 2009 CCA LEXIS 270 (N-M.C.C.A., July 31, 2009)

COUNSEL:

For Appellant: Lieutenant Michael R. Torrisi, JAGC, USN (argued); Lieutenant Brian D. Korn, JAGC, USN.

For Appellee: Captain Robert E. Eckert Jr., USMC (argued); Brian K. Keller, Esq.

JUDGES: ERDMANN, J., delivered the opinion of the court, in which BAKER, J., joined. RYAN, J., filed a separate concurring opinion. STUCKY, J., filed a separate opinion concurring in part and

dissenting in part. EFFRON, C.J., filed a separate dissenting opinion.

OPINION

Judge ERDMANN delivered the opinion of the court.

A general court-martial composed of members convicted Hospital Corpsman Second Class Ivor G. Luke, contrary to his pleas, of two specifications of indecent assault upon Seaman Recruit TN in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2000).[1] Luke was sentenced to confinement for two years and a bad-conduct discharge. The convening authority approved the sentence as adjudged and the United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. United States v. Luke, No. NMCCA 200000481, 2004 CCA LEXIS 218, at *16, 2004 WL 2187577, at *6 (N-M. Ct. Crim. App. Sept. 28, 2004).

Upon Luke's appeal to this court in 2005, we initially granted two evidentiary issues and later granted a supplemental issue as to whether Luke's conviction

---

[1] Prior to trial the Government dismissed with prejudice three specifications of indecent assault and three specifications of indecent language involving other victims. Luke was found not guilty of one specification of sodomy and two specifications of indecent language involving Seaman Recruit TN.

could be affirmed in light of newly discovered evidence.[2]

Following two United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967), hearings and two Court of Criminal Appeals decisions, the case is before this court for the third time. We now review the following three issues: whether newly discovered evidence would probably have produced a substantially more favorable result; whether the military judge erred when he held that the Government was not required to disclose Prosecution Exhibit (PE) 17 to the defense in pretrial discovery; and whether Luke's due process rights have been violated by the lengthy post-trial processing of his appeal. We hold that the newly

---

[2] Review was initially granted on the following issues:

I. Whether the lower court erred when it upheld the trial judge's exclusion, during cross-examination, of an alleged victim's abortion after it became relevant and material rebuttal to the victim's testimony.

II. Whether the lower court erred when it upheld the Government's failure to disclose evidence that it had prepared to use on re-direct examination of a Government witness. United States v. Luke, 61 M.J. 278 (C.A.A.F. 2005) (order granting review).

The supplemental issue was:

Whether Appellant's conviction can be affirmed by this Court in light of the fact that evidence of fraudulent testing of DNA has been newly discovered. United States v. Luke (Luke I), 63 M.J. 60, 61 (C.A.A.F. 2006); United States v. Luke, 62 M.J. 328 (C.A.A.F. 2005) (interlocutory order granting motion to file a supplemental issue).

discovered evidence would probably not have produced a substantially more favorable result; if the military judge erred in holding that the Government was not required to provide the defense with PE 17 in pretrial discovery, it was harmless error; and Luke's post-trial due process rights were not violated. We therefore affirm the Navy-Marine Corps Court of Criminal Appeals.

DISCUSSION

As the three issues before the court present discrete legal and factual matters, we will set forth the facts and procedural background relevant to each in the discussion of the individual issues.

I. Whether the newly discovered evidence of Mills' misconduct renders his conviction unreliable

Factual and Procedural Background:

The situation giving rise to Luke's conviction took place when he was serving as a hospital corpsman aboard the USS Port Royal. Luke was accused of indecent assault upon a shipmate, Seaman Recruit TN, when she sought a pelvic exam from him after Luke diagnosed her boyfriend, Fireman RA, another shipmate, with a sexually transmitted disease. Luke contested the charges and maintained that he did not examine TN nor did he commit an indecent assault upon her. At Luke's court-martial TN and RA both testified to a series of events which

supported the indecent assault specifications and which Luke denied.[3] The defense theory of the case was that TN and RA made up the allegations against Luke in order to avoid the consequences of the command discovering their romantic relationship, which was in violation of ship policy.

In addition to testimony from TN and RA, the Government presented testimony from four Naval Criminal Investigative Service (NCIS) investigators and two experts from the United States Army Criminal Investigation Laboratory (USACIL). The USACIL witnesses testified about serological and DNA testing performed on several items removed from the sleeping quarters of the medical compartment on the USS Port Royal where TN alleged the incident took place, as well as a bra and panties worn by TN during the incident.

Phillip Mills, then a forensic chemist at USACIL, conducted the serology[4] analysis of the evidence in Luke's case. Mills examined a bedsheet, a bra, a pair of panties, and a pillowcase for serological evidence. At Luke's court-martial, Mills testified about stains

---

[3] The underlying facts were detailed in this court's 2006 decision and need not be repeated here. Luke I, 63 M.J. at 61.

[4] Serology is "the branch of science dealing with the properties, uses, and preparation of serums. A serum in this sense is a body fluid containing substances useful in the diagnosis, prevention, and treatment of disease." 5 J. E. Schmidt, Attorneys' Dictionary of Medicine and Word Finder S-119 (2010). As used here, Mills explained that "serology" was the examination of body fluid stains to determine the biochemical makeup of the stain.

he found on the sheet and the bra which revealed the presence of amylase and epithelial cells. Mills did not find any stains of consequence on the pillowcase or the panties.

Mills testified that amylase is an enzyme that is found in most body fluids in low concentrations but is found in high concentrations in saliva. Epithelial cells are cells forming epithelium, the lining of body cavities and the covering of the skin and mucous membranes. 2 Schmidt, supra note 4, at E-164. Mills explained that epithelial cells are found throughout the body and contain DNA.

Mills testified that the amylase and the epithelial cells on the bedsheet were consistent with saliva and vaginal secretions. The amylase on the bra was found in a high enough concentration that it was "indicative of saliva." Mills further testified that the epithelial cells found on the bra could have come from TN simply wearing the bra. He sent those stains to Marilyn Chase, another USACIL examiner, for DNA analysis.

Chase was qualified as an expert at Luke's court-martial in the forensic application of serological and DNA analysis. She testified about the techniques used to conduct DNA analysis, the quality control procedures in place at USACIL, as well as the peer review process for DNA analysis at USACIL. Chase examined TN's bra, her panties, a cutting from the sheet, and a cutting from a blanket. Chase testified that "[w]hen I analyzed the DNA in the sheet, it was

consistent -- or -- with a mixture -- what you see in a mixture of the DNA profiles that were also seen in the blood standards of Luke and [TN]." Regarding the sample found on the bra worn by TN, Chase testified that her analysis revealed DNA types from at least three people on the bra which were consistent with the DNA profiles of TN, Luke, and RA.[5] Defense counsel questioned Chase about the possibility of contamination of the samples in testing and the possibility of degradation of the specimens. Defense counsel also raised the possibility of exacerbation of degradation of a mixed sample when there are a number of different profiles in a specimen. On redirect examination, trial counsel questioned Chase about the specimens in Luke's case and Chase stated "my controls worked properly in this case. I saw no indication of contamination in any of my reagents or any of the other controls in this case."[6]

The testimony given by Mills and Chase as to the presence of saliva on TN's bra was relied upon by the Government to support TN's account of the incident (that Luke had sucked on her breast during the examination). The Government relied on the DNA on the bedsheet as proof that the encounter took place

---

[5] Chase testified that the DNA analysis on the panties did not reveal DNA profiles of anyone other than TN.

[6] At the first DuBay hearing, when asked whether she could tell whether the evidence provided by Mills had been contaminated, Chase replied, "I couldn't tell if it'd been contaminated when I received the evidence and inventoried it, it didn't look like anything unusual. . . . I couldn't tell unless there was something actually physically wrong."

as TN described, contradicting the defense's position that any evidence of saliva and Luke's DNA on the sheet resulted because he had masturbated and then sucked his thumb on the bed that same day. Luke was subsequently found guilty of two specifications of indecent assault in violation of Article 134, UCMJ.

In 2005, six years after Luke's court-martial and one month prior to argument on the two issues originally granted by this court, USACIL issued a memorandum to all staff judge advocates informing them that disciplinary action had been taken against Phillip Mills, the USACIL forensic examiner who had conducted the serological examination in this case. The USACIL memorandum noted that the disciplinary action was taken after it had been discovered that Mills had cross-contaminated and/or switched samples within and between several cases, made a false data entry and altered documentary evidence, falsely stated the results of an examination which he had not performed, and misrepresented work he had performed.

In response to a defense motion, this court granted a supplemental issue addressing the newly discovered evidence of Mills' misconduct and its possible impact on the case. Luke I, 63 M.J. at 61; Luke, 62 M.J. 328. We set aside the decision and ordered further inquiry under DuBay, to determine "whether a Government forensic examiner contaminated Appellant's DNA sample or otherwise falsified pertinent test results." Luke I, 63 M.J. at 61. A DuBay hearing was

subsequently conducted on June 2 and 8, 2006.[7] United States v. Luke, 64 M.J. 193, 194 (C.A.A.F. 2006) (interlocutory order, Appendix A).

Based on testimony and evidence presented at the hearing, the DuBay military judge found that "Mr. [Mills] demonstrated a pattern of mistakes in conducting DNA analysis" but "[n]o evidence was presented that Mr. [Mills] ever altered any results to falsely show the presence or absence of DNA in a sample, or that his failure to follow proper procedures was an attempt to improperly influence or alter the outcome of DNA analysis." Id. at 196. The DuBay military judge found "Mr. [Mills] was proficient in performing serology analysis. He had a full understanding of the standard procedures for conducting serology casework." Id. He also found that Mills only performed the serology portion of the analysis in Luke's case and Chase did the DNA analysis on the samples that Mills prepared. Id. at 196-97. The DuBay military judge found that Mills did not conduct the DNA analysis and therefore never had an opportunity to falsify the results. Id. at 197. He also found that there was no possibility of cross-contamination between the bedsheet and the bra. Id.

---

[7] Following the discovery of Mills' misconduct, the U.S. Army Criminal Investigation Command began a remediation project to review/retest 465 cases on which Mills had worked between 1995 and 2005. This investigation had not been concluded at the time of the first DuBay hearing. The investigation also included two independent DNA investigators who were to review Mills' work and USACIL's procedures.

Pursuant to the remand order, the DuBay military judge's findings were returned directly to this court and after further briefing on the supplemental issue, we remanded the case to the Court of Criminal Appeals for further consideration. United States v. Luke, 65 M.J. 5 (C.A.A.F. 2007) (summary disposition). On May 27, 2008, the Court of Criminal Appeals ordered a second DuBay hearing to determine the status of USACIL's internal investigation and to examine the two independent DNA experts as to the possible impact of Mills' misconduct on Luke's case. United States v. Luke, No. NMCCA 200000481, slip op. at 4 (N-M. Ct. Crim. App. May 27, 2008). The second DuBay decision reviewed a draft of the USACIL report and noted that the final report was due on September 30, 2008. The second DuBay military judge concluded that "[n]o prior facts established by the prior Dubay [sic] hearing were modified or altered."

Relying on the DuBay hearings as well as the USACIL final report on Mills' misconduct released on September 30, 2008, the Court of Criminal Appeals issued an opinion affirming the original findings and sentence on July 31, 2009. United States v. Luke, No. NMCCA 200000481, 2009 CCA LEXIS 270, at *24, 2009 WL 2345124, at *8 (N-M. Ct. Crim. App. July 31, 2009). The CCA found:

The facts elicited both during the USACIL review of Mr. Mills' work and during the DuBay hearings demonstrate that Mr. Mills' DNA analysis while at

USACIL suffered from a number of errors. Notwithstanding the seriousness of these errors, as appropriately commented on by the military judge during the second DuBay hearing, there is no evidence that Mr. Mills had any involvement in the appellant's case beyond the serological analysis. . . . [T]he evidence relating to deficiencies in Mr. Mills' DNA analysis would be of limited probative value in assessing the accuracy of his serological examination in the appellant's case and, albeit potential impeachment evidence, would not probably produce a substantially more favorable result for the accused. 2009 CCA LEXIS 270 at *14-*15, 2009 WL 2345124, at *5 (citation, footnote, and quotation marks omitted).

Analysis:

Rule for Courts-Martial (R.C.M.) 1210(f)(2)[8] sets forth the grounds for granting a new trial based on newly discovered evidence, specifically:

---

[8]Article 73 provides that the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence within two years after the convening authority approves the sentence. Article 73, UCMJ, 10 U.S.C. § 873 (2006). In his separate opinion, Judge Stucky argues that this time limit prohibits this court from exercising jurisdiction as to Issue I. United States v. Luke, M.J. (5) (C.A.A.F. 2011) (Stucky, J. concurring in part and dissenting in part). Because this issue reached us on direct review under Article 67, UCMJ, 10 U.S.C. § 867 (2006), we disagree. When the evidence of Mills' misconduct was revealed to the defense while Luke's appeal was pending before this court, Luke's appellate defense counsel filed a motion for a supplemental issue specifically

(2) Newly discovered evidence. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

(A) The evidence was discovered after the trial;
(B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
(C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

"[T]he reviewing court must make a credibility determination, insofar as it must determine whether the 'newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.'" United States

---

noting that the procedure for granting a new trial based on newly discovered evidence "is to petition the Judge Advocate General for a new trial 'within 2 years after approval by the convening authority.'" Luke's appellate counsel explained, "[b]ecause the convening authority approved Appellant's sentence over two years ago, Appellant is seeking relief from this court." Indeed, in Luke I, this court granted the supplemental issue to determine whether the results of Luke's court-martial were reliable in light of newly discovered evidence. 63 M.J. at 61. Therefore this case is not before the court under a petition filed pursuant to Article 73, UCMJ, and as both parties agree that the framework of R.C.M. 1210 should govern our analysis, we proceed under the grant of the supplemental issue in Luke I.

v. Brooks, 49 M.J. 64, 69 (C.A.A.F. 1998) (citation omitted). "The reviewing court does not determine whether the proffered evidence is true; nor does it determine historical facts. It merely decides if the evidence is sufficiently believable to make a more favorable result probable." Id.

The parties agree that subsections (A) and (B) of R.C.M. 1210(f)(2) are satisfied but disagree as to subsection (C). Luke argues that the newly discovered evidence of Mills' "misconduct, dishonesty and sloppiness" would probably produce a more favorable result at a new trial. Luke urges this court to set aside the findings and sentence because the newly discovered evidence attacks the reliability of the Government's scientific analysis and raises questions about the "conclusions that formed the bedrock of Appellant's conviction."

The Government counters that the impeachment evidence of Mills' misconduct is not an adequate basis to convene a new court-martial because the new evidence does not refute an essential element of the Government's case. In light of all of the other evidence presented at Luke's court-martial, the Government argues that it is unlikely that impeachment of Mills would result in a more favorable outcome for Luke.

At the first DuBay hearing, six current and former employees of the USACIL testified, including Mills and Chase. The findings of fact and conclusions of law of the military judge following the DuBay

hearing contained a number of specific findings as to the procedures Mills followed in conducting the serological examination and included the following:

29. Mr. [Mills] demonstrated a pattern of mistakes in conducting DNA analysis, and on at least one occasion, he attempted to cover up his mistake by making a false data entry.

30. No evidence was presented that Mr. [Mills] ever altered any results to falsely show the presence or absence of DNA in a sample. Or that this failure to follow proper procedures was an attempt to [im]properly influence or alter the outcome of the DNA analysis in any of the cases.

31. It is evident, however, that Mr. [Mills] had significant problems with the DNA analysis process, which calls into question the forensic reliability of the results of his DNA casework.

32. Mr. [Mills] disciplinary and proficiency problems were all related to his performance of DNA analysis. Mr. [Mills] had never demonstrated a lack of proficiency in any of his other duties.

33. Mr. [Mills] was proficient in performing the serological analysis. . . .

34. In Appellant's case, Mr. [Mills] performed the serology portion, but did not conduct any of the DNA analysis.

35. Mr. [Mills] understood the standard procedure for conducting serology analysis, and followed it in Appellant's case.

. . . .

43. The presence of Appellant's DNA on the bra can be explained in one of three ways: a) Appellant came into contact with the bra sometime prior to it being collected as evidence; b) the bra became contaminated after it was collected as evidence by coming into contact with Appellant's DNA from another sample; or c) the results were falsified.

44. With respect to Mr. [Mills], he did not conduct the DNA analysis, so he did not have the opportunity to falsify the results. Also, he had no motive to falsify the results, such as the desire to cover up a mistake, as in the documented case. Also, no evidence was presented that Ms. [Chase] or anyone else ever sought to falsify the results.

45. The panties could not have contaminated the bra with Appellant's DNA, because the Appellant's DNA was not present on, the panties.

46. Neither the bed sheet or any other item could have contaminated the bra during the serology portion, because the sample of the bra was cut and sealed in a test tube before the other items were opened.

47. The bra was not contaminated with Appellant's DNA during the serology portion of the forensic analysis, and the results of the DNA analysis were not falsified. Luke, 64 M.J. at 196-97.

Based on the evidence presented at the DuBay hearing, none of these findings could be found to have been clearly erroneous. However, viewed in light of the details which emerged in USACIL's report on Mills' misconduct which was issued two years after the first DuBay hearing, Findings 32 and 33 of the first DuBay military judge, regarding Mills' proficiency in serological analysis, are called into question.

There is support for Luke's argument that, in affirming the DuBay military judge, the CCA overlooked the evidence from the USACIL investigation that Mills was engaged in misconduct during the time period Luke's evidence was examined by USACIL. The primary focus of USACIL's report on Mills' misconduct was his DNA analyses performed between 2000 and 2005 "because of the increased potential for finding case samples still available for retesting" and "[t]his was also the period in which Mr. Mills performed a majority of his DNA casework."[9] The report did, however, review Mills' serology work from 1995 through 1999 and revealed "thoroughness issues"

---

[9] The report found that the first instance of Mills' DNA false documentation was in 2002, four years after Luke's 1998 court-martial. The report found no cases with "DNA issues" for the time between 1995 and 1999.

with his serological analyses during the time period when Luke's sample was analyzed.

Mills conducted serological analyses for thirty-seven Navy cases between 1995 and 1999. Of those thirty-seven cases, investigators found fifteen cases in which a review of Mills' analysis revealed "thoroughness issues." The report explained:

This review identified a lack of thoroughness in the work performed by Mr. Mills. Mr. Mills did not examine all the biological swabs and smears submitted for examination. This also resulted in him spending less time on examinations. He was not properly screening cases because of his lack of thoroughness and the shorter times spent on examinations . . . [H]is screening techniques my [sic] have resulted in some questionable negative results in these cases.

Despite these thoroughness issues and the report's conclusion that Mills' screening techniques may have resulted in some questionable negative results during this time, the report did not contain any evidence of contamination or false reporting in Mills' serological analysis between 1995 and 1999. Notably, the report indicated that Mills' thoroughness issues may have resulted in negative findings where there may have in fact been forensic evidence present. "[Mills] had forty-nine negative cases in the period from 1995-2005. His examination of evidence was incomplete, rushed and not properly screened.

Consequently it is doubtful that all forty-nine of these cases were completely negative."

Based on USACIL's final report, the DuBay military judge's determination that Mills was proficient in serological analysis is clearly erroneous. Mills' "thoroughness issues" reflect that he did mishandle evidence when he conducted serological analyses during the period when Luke's evidence was processed by the lab. However, the other findings of the DuBay military judge as to Mills' handling of Luke's sample and the lack of evidence of contamination are not clearly erroneous and are therefore upheld by this court.[10]

Luke argues that the testimony of Chase and Mills was at the core of his conviction because it "assigned instant credibility to [TN]'s story" which was a critical issue in an "otherwise shaky" case. However, while the DNA evidence may have corroborated TN's story, it was not what Military Rule of Evidence (M.R.E.) 608 defines as credibility evidence. See M.R.E. 608(a) ("The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation. . .). Luke also alleges that the CCA incorrectly deemed the newly discovered evidence "merely" impeachment evidence. However, using evidence of Mills' lack of thoroughness in his serological examinations and his mishandling of

---

[10] The second DuBay military judge's findings are also clearly erroneous to the extent that he found that no prior fact established by the prior DuBay hearing were modified or altered as a result of the USACIL report.

evidence during his DNA examinations to attack his credibility would indeed amount to impeachment evidence. See United States v. Banker, 15 M.J. 207, 210 (C.M.A. 1983) ("Impeachment can be defined as an attack on the credibility or believability of a witness. In general, it is a process of explaining away a witness' testimony as to the existence of a fact at issue in a trial.") (citations omitted). Regardless of how the CCA may have classified the DNA evidence, Luke is correct that Mills' and Chase's testimony supported the Government's theory of the case. However, Luke's argument that TN's "credibility was intertwined with the credibility of the DNA evidence" goes too far. This is not a case where the evidence of newly discovered evidence would have "substantially impeached the prosecutrix' testimony on a material matter." United States v. Williams, 37 M.J. 352, 354 (C.M.A. 1993).

Luke also argues that there probably would be a different result at a new trial because the members would have no confidence that Mills had not contaminated the evidence, or, more broadly, that his misconduct would render him such a completely discredited witness that the members would not believe him on any issue. While there is no evidence of any alleged contamination during the serological examination, such contamination could have only occurred in one of two ways: the sheet and bra may have been cross-contaminated; or Mills took blood from Luke's sealed blood sample and contaminated the evidence during his serological examination. However, the military judge at the first DuBay

hearing found that neither the bedsheet nor the bra could have been contaminated by other items because "the sample of the bra was cut and sealed in a test tube before the other items were opened." Luke, 64 M.J. at 197. Luke has not established that this finding is clearly erroneous.

As to the possibility that Mills intentionally contaminated the evidence with Luke's DNA from Luke's blood sample, there is no evidence from either the DuBay hearing or the USACIL report that Mills intentionally contaminated a sample in order to support a prosecution.[11] There is no need to open or examine an individual's blood sample during a serological examination of body fluids so the chance of contamination caused by a lack of thoroughness is diminished. Nor is there any evidence that Luke's blood sample was ever examined or opened by Mills during the serological examination. While it is clear that Mills had "thoroughness" issues, those issues appear to have resulted from sloppiness and undue haste, not intentional contamination.

---

[11]Luke cites two state cases to support his argument that Mills' misconduct would completely undermine the validity and reliability of all of his forensic work. In re Investigation of the West Virginia State Police Crime Lab., 190 W. Va. 321, 438 S.E.2d 501 (W. Va. 1993); State v. Gookins, 135 N.J. 42, 637 A.2d 1255 (N.J. 1994). In both of those cases, however, the analyst/arresting officer repeatedly falsified data resulting in more convictions. In re W. Va. State Police Crime Lab., 438 S.E.2d at 503; Gookins, 637 A.2d at 1257. No evidence of falsification of evidence based on a motive to increase convictions has been established in this case.

Luke also analogizes this court's decision in United States v. Webb, 66 M.J. 89 (C.A.A.F. 2008), to Luke's case because "'evidence that the observer, a link in the chain of custody, had been punished for dishonesty' may have raised questions about the integrity of the appellant's urinalysis." Luke argues that the analysis for Webb and Luke's cases must be the same. Webb, however, is distinguishable from the instant case. In Webb, we held merely that a military judge did not abuse her discretion in granting a defense motion for a new trial. Id. at 93. We did not hold that a new trial was actually required. Luke also relies on our case law for the proposition that "[a] petition for a new trial may rest upon newly discovered evidence that would 'substantially impeach[]' critical prosecution evidence 'on a material matter.'" United States v. Sztuka, 43 M.J. 261, 268 (C.A.A.F. 1995) (quoting Williams, 37 M.J. at 354) (alteration in original). While evidence of Mills' misconduct would certainly have provided impeachment evidence as to Mills' competence, it was attenuated in time and relevance. Luke does not dispute Chase's analysis of the DNA on the sheet and TN's bra but rather argues that evidence of Mills' misconduct in other cases may have created a doubt in the members' minds as to Mills' overall competency or convinced them that he intentionally or negligently contaminated the evidence with Luke's DNA during the serological analysis. As noted, the serological evidence was not the only evidence the Government presented in Luke's case. Seaman Recruit TN and Fireman RA

both testified for the Government contrary to Luke's testimony. Our task is to determine "whether the 'newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.'" Brooks, 49 M.J. at 69 (citation omitted).

The newly discovered evidence as it relates to this case goes to the performance of the serology screening and not the DNA tests. Unless Luke can show on appeal a probability of contamination in the serology screening that would account for his DNA being present on the bra and blanket, he is left with the prospect of rebutting compelling DNA statistics[12] based on a defense that his prior masturbation and thumb-sucking resulted in the presence of his DNA in TN's bra. Viewing the entire record of trial, to include the newly discovered evidence, the DuBay military judge's findings that are supported by the evidence, and the relative weakness of Luke's case,[13]

---

[12] Dr. Basten testified that it was 290,000 times more likely that the DNA found on the bra was from TN, RA, and Luke than TN, RA, and an unknown contributor.

[13] Luke's defense was that TN and RA fabricated the allegations against him to avoid the consequences of the command discovering their romantic relationship, which was in violation of ship policy. This theory, however, is undermined by the fact that TN and RA voluntarily informed the command of their relationship when they reported the incident to the command. Luke also testified that on the date of the alleged events he masturbated on the bed in the hospital quarters using a lubricant called Surgilube and then fell asleep sucking his thumb, thereby accounting for the semen found on the linens and the possibility that Surgilube might be found on a

we hold that the newly discovered evidence would probably not have resulted in a substantially more favorable result for Luke.[14]

II. Whether the military judge erred when he found the Government was not required to disclose PE 17 relating to statistical probabilities discussed on redirect examination

Factual and Procedural Background:

Following the testimony of the USACIL witnesses at court-martial, the Government called Dr. Christopher Basten, a research associate statistician from North Carolina State University, to testify as to the probability that Luke's DNA was contained in the DNA mix found on the bra and the bedsheet versus that of someone else. After being qualified as an expert in statistical genetics, Dr. Basten testified as to the likelihood of Luke being a contributor to the stain on the sheet and bra under several different scenarios. During his testimony Dr. Basten was assisted by a series of demonstrative exhibits that

---

swab NCIS took from his mouth.

[14] In his dissent, the Chief Judge argues Mesarosh v. United States, 352 U.S. 1, 12, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956), dictates that "[b]ecause 'the original finder of fact' was a court-martial panel, only a new panel 'can determine what it would do on a different body of evidence.'" United States v. Luke, M.J. (9) (C.A.A.F. 2011) (Effron, C.J. dissenting). We are satisfied that the procedures traditionally utilized by this court to review cases presenting newly discovered evidence are appropriate in this case. See, e.g., Williams, 37 M.J. at 356; United States v. Johnson, 61 M.J. 195, 198 (C.A.A.F. 2005).

set forth the numerical statistical likelihood that Luke was a contributor under the different assumptions presented to Dr. Basten.[15]

During the cross-examination of Dr. Basten, defense counsel sought to discredit his explanation of the statistical findings and raised the possibility that other unknown contributors' DNA could also be contained in the stain on the bra:

Q: But if you weren't taking into account the profiles of the two people -- let's say that they were unknown -- would that affect the way you do the calculations?
A: That would affect it if we didn't have any information about the other individuals.

. . . .

Q: Now, whenever there's doubt as to the number of contributors to a mixed sample, there can be considerable variation in the likelihood ratio; is that correct?
A: There will be some variance, yes.

On redirect examination, trial counsel asked Dr. Basten to address the possibility raised by the defense of at least two unknown people contributing

---

[15] Prosecution Exhibits 14, 15, 16, and 18 were handwritten posters similar to PE 17 in format and all displayed the statistical likelihood that Luke and TN were contributors to the stains on the sheet and the bra in various combinations with Fireman RA and other unknown contributors. The record evidence of the exhibits includes the notation "PEs 14-18 . . . used as demonstrative aid only." None of these demonstrative exhibits were offered into evidence.

to the stains and referred him to PE 17, which had not been used in his direct examination:

Q: And Doctor, finally, in Prosecution Number 17, this is the possibility that the defense just addressed, two unknowns in the bra. Can you please explain your findings with respect to two other unknowns in the bra.
A: So another alternate explanation would be that it was [TN] and two unknown individuals. And if we compare that to the idea that it was Luke, [TN] and [RA], it's -- the evidence is 51 million times more likely that it's the three of them than [TN] and two unknowns.

Shortly thereafter the defense counsel requested an Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2000), session. During the Article 39(a), UCMJ, session Luke's attorney complained to the military judge that the basis for the statistical analysis in PE 17 had never been provided to the defense during discovery. Trial counsel responded that Dr. Basten had calculated the figures used in PE 17 "recently." He argued that it was evidence in rebuttal and they were not required to provide rebuttal evidence in response to pretrial discovery requests. The military judge found that it was clearly rebuttal evidence to which the defense was not entitled during discovery. Defense counsel then argued that the probative value of the exhibit was outweighed by its prejudicial effect. The military judge held the prejudicial impact was minimal, that there was some probative value,

and declined to strike the exhibit or provide a limiting instruction.

Before this court Luke argues that the military judge erred when he found that the Government was not required to disclose PE 17 to the defense prior to trial. He asserts that the defense never opened the door for the admission of this evidence during cross-examination and the admission of this evidence was not harmless because defense counsel was not prepared to properly cross-examine the witness on this point.

In response, the Government argues that trial counsel did not violate discovery obligations because the statistical ratio at issue in PE 17 had been calculated "recently" and the evidence was only presented in response to defense counsel's assertions about two unknown contributors to the DNA profiles on the victim's bra.

Rule for Courts-Martial 701(a)(2) provides:

After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in

the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

"The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice." United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004). "To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial. . . . The parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate." Id. (citation omitted).

Defense counsel's discovery request sought "[a]ny handwritten, computer-generated, typed, or recorded statements by any witness for the government" as well as "[a]ny writing or document, including notes, used by a witness to refresh his/her memory for the purpose of testifying at trial, either while testifying or before testifying." However, it is impossible for this court to address whether there was a discovery violation as the record does not reflect when PE 17

was prepared. We cannot know the meaning of trial counsel's comment that PE 17 had only been produced "recently." The other demonstrative exhibits used by Dr. Basten (PEs 14, 15, 16, and 18) were used during direct examination and were in the same format as PE 17, which was used in rebuttal. In addition, comments made by trial counsel during the Article 39(a), UCMJ, session indicated that the Government anticipated that defense counsel would ask the question that he did during cross-examination, and that the Government was prepared to rebut it with PE 17. If it was prepared pretrial, it should have been provided to the defense in response to their discovery request pursuant to R.C.M. 701(a)(2) regardless of when the Government intended to use it. United States v. Trimper, 28 M.J. 460, 468 (C.M.A. 1989). Indeed "[a]n accused's right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy." Webb, 66 M.J. at 92. However, if PE 17 was produced mid-trial in response to the cross-examination of Dr. Basten, then the Government could not have provided it to the defense pretrial because it did not exist.

Although we cannot resolve whether a discovery violation occurred, "[a]n appellate court may resolve a discovery issue without determining whether there has been a discovery violation if the court concludes that the alleged error would not have been prejudicial." United States v. Santos, 59 M.J. 317, 321 (C.A.A.F. 2004).

On direct examination, trial counsel elicited from Dr. Basten a full explanation of the statistics presenting the likelihood that biological evidence in the case linked Luke to the bra. Direct examination of Dr. Basten revealed information about his analysis, including which databases and populations he relied upon to generate the statistics presented. There was no objection during the direct examination of Dr. Basten as to the underlying calculations on the other demonstrative exhibits and apparently the statistical basis for those exhibits was no surprise to the defense. There is no indication that Dr. Basten relied on a separate database or population for the calculations in PE 17. It was simply a piece of demonstrative evidence that did no more than reiterate the expert's testimony on direct examination. The defense therefore had all of the information necessary to understand how the calculations in PE 17 and the other demonstrative exhibits were derived. Further, given the multiple statistical formulations presented on direct examination, we cannot find that one additional calculation of the odds that the physical evidence was attributable to Luke tipped the scales against Luke in this case. Therefore, we find that the admission of PE 17 was not prejudicial.

III. Whether Luke's due process rights were violated by untimely post-trial proceedings

The Court of Criminal Appeals reviewed Luke's claim that he was denied speedy post-trial processing

of his case. Luke, 2009 CCA LEXIS 270, at *21, 2009 WL 2345124, at *6. That court found that any due process violation that may have occurred in Luke's case was harmless beyond a reasonable doubt. 2009 CCA LEXIS 270 at *22, 2009 WL 2345124, at *7.

Before this court Luke renews his argument that the eleven-year delay between his conviction and the lower court decision was unreasonable and is attributable to the Government. Luke cites the numerous motions for enlargement of time made by both his defense attorney and the Government before the lower court and also faults the Government for the delayed investigation into Mills' misconduct. Luke claims he was prejudiced by the post-trial delay because the Government destroyed the physical evidence, making any review of the biological evidence impossible, and because the United States has denied his application for citizenship because of his court-martial conviction.

The Government cites the lengthy, in-depth investigation into Mills' misconduct that was required to properly evaluate all the cases Mills handled as reason for the post-trial delay. Given these extraordinary circumstances, the Government argues that the post-trial delay in Luke's case was reasonable. Further, the Government asserts that Luke's arguments that he suffered prejudice are weak and he has not presented any concrete evidence as to why his application for citizenship was denied.

This court's methodology for reviewing issues of post-trial and appellate delay was set out in United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006). We first determine whether the delay is facially unreasonable and, if so, we examine the four factors set forth by the Supreme Court in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). United States v. Young, 64 M.J. 404, 408-09 (C.A.A.F. 2007). The four factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Id. If this analysis leads us to conclude that the appellant has been denied the due process right to speedy post-trial review and appeal, we grant relief unless we are convinced beyond a reasonable doubt that the constitutional error is harmless. Id. at 409 (citation omitted). "Issues of due process and whether constitutional error is harmless beyond a reasonable doubt are reviewed de novo." Id. (citation omitted).

With a delay of over eleven years between the completion of his court-martial and the issuance of the Court of Criminal Appeals decision, there is no doubt that the length of delay is facially unreasonable. However, we need not engage in a separate analysis of each factor where we can assume error and proceed directly to the conclusion that any error was harmless beyond a reasonable doubt. Id. Reviewing the totality of circumstances in this case,[16] including the fact that we have found no

---

[16] We acknowledge that the delay in this case was extreme and take particular note of the second DuBay military judge's

merit in either of substantive issues appealed by Luke, we conclude that any denial of his right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.[17] 17 See id.; United States v. Bush, 68 M.J. 96, 104 (C.A.A.F. 2009) (holding denial of right to speedy post-trial review harmless beyond a reasonable doubt).

However, the majority of the delay was attributable to the procedural back and forth among this court, the Court of Criminal Appeals, and the DuBay proceedings.

DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

CONCUR BY: RYAN; STUCKY (In Part)

CONCUR

RYAN, Judge (concurring):

---

conclusion regarding the speed of the Government's review: There appeared to be no sense of urgency on the part of the USACIL laboratory administration or their chain of command to resolve the weighty issues associated with the substantial allegations pending against them. While I do not consider the investigation of Mr. Mills and the subsequent analysis the model of dispatch, it does appear to be thorough.

[17] We also note that there is no evidence in the record to support Luke's contention that his application for citizenship was denied.

Appellant successfully petitioned this Court to grant his supplemental issue pursuant to Article 67, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867 (2006), United States v. Luke, M.J. (2) (C.A.A.F. 2011). Nonetheless, with respect to the supplemental issue, I view his claim as a petition for a new trial on the basis of newly discovered evidence, governed by Article 73, UCMJ, 10 U.S.C. § 873 (2006), and Rule for Courts-Martial (R.C.M.) 1210. Indeed, Appellant has consistently invoked the statutory language of Article 73, UCMJ, and R.C.M. 1210, and the Court's opinion makes clear that "the framework of R.C.M. 1210 should govern our analysis." Luke, M.J. (12 n.8).

I concur in and join the opinion of the Court. I write separately because as a matter of first impression I would have found Appellant's petition for a new trial based on newly discovered evidence to be time-barred. Both Article 73, UCMJ, and R.C.M. 1210(a) set forth a clear time limit for petitioning for a new trial: "2 years after approval by the convening authority of a court-martial sentence." This is so even if the petitioner did not discover the evidence until after the two-year time period has expired. See, e.g., United States v. Rashid, 375 F. App'x 199, 201 (3d Cir. 2010) (holding that a motion for a new trial based on newly discovered evidence under Fed. R. Crim. P. 33 was untimely when made outside the three-year filing period and based on evidence discovered outside that three-year filing period).

But when this Court considered the timeliness of Appellant's request, it ordered the CCA to conduct a DuBay hearing in order to determine whether Appellant was entitled to a new trial. United States v. Luke (Luke I), 63 M.J. 60, 63 (C.A.A.F. 2006). The Government has not appealed this decision. Therefore, although I agree with the reasoning of the dissent in Luke I, see id. at 64 (Erdmann, J., dissenting), and am prepared to revisit the issue in an appropriate case, I regard the decision in Luke I as law of the case here. See United States v. Erickson, 65 M.J. 221, 224 n.1 (C.A.A.F. 2007) (holding that when a ruling is not appealed, it "will normally be regarded as law of the case and binding upon the parties").[1]

DISSENT BY: STUCKY (In Part); EFFRON

---

[1] While a jurisdictional error may not be waived, the filing time limit set forth in Article 73, UCMJ, and R.C.M. 1210 is more akin to a statute of limitations. See John R. Sands & Gravel Co. v. United States, 552 U.S. 130, 133, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) (noting that whereas some time limits are jurisdictional, "[m]ost statutes of limitations" are not). Whereas United States v. Rodriguez, 67 M.J. 110 (C.A.A.F. 2009), and Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), considered statutory language governing when courts are permitted to take appeals, see Article 67(b), UCMJ; 28 U.S.C. § 2107(a), the language at issue here in Article 73, UCMJ, and R.C.M. 1210, like the language of Fed. R. Crim. P. 33, governs when a petitioner has the right to file. Accord Eberhart v. United States, 546 U.S. 12, 19, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005) ("[I]t is difficult to escape the conclusion that [time limits for Fed. R. Crim. P.] 33 motions are . . . nonjurisdictional" (citing Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004))).

DISSENT

STUCKY, Judge (concurring in part and dissenting in part):

Because I believe that under recent precedents we have no jurisdiction to entertain Appellant's request for a new trial, I would vacate the grant of review on Issue I and dismiss the petition with respect to that issue. I concur in the majority's disposition of Issues II and III.

I.

The convening authority acted on Appellant's case on March 29, 2000. More than five years later, on August 31, 2005, after this Court had already granted review of two issues, Appellant submitted a motion to file a supplemental issue -- asking for a new trial -- directly to this Court. We granted review of the supplemental issue and remanded for an evidentiary hearing into whether the evidence supporting his conviction had been compromised or falsified. See United States v. Luke (Luke I), 63 M.J. 60, 63 (C.A.A.F. 2006).

The Government, relying on our decision in United States v. Rodriguez, 67 M.J. 110 (C.A.A.F. 2009), now argues in its brief that we do not have jurisdiction to consider whether to grant a new trial

in this case.[1] While Appellant insists that our assertion of jurisdiction in Luke I is controlling, and points to the 2009 opinion of the court below as support for the proposition, neither is convincing. See United States v. Luke, No. NMCCA 200000481, 2009 CCA LEXIS 270, 2009 WL 2345124 (N-M. Ct. Crim. App. July 31, 2009). The decision of a lower court cannot, of course, control our independent assessment of our own jurisdiction, an assessment we are required to make. Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884).

In Rodriguez, decided after Luke I, a majority of this Court held that the petition-filing deadline in Article 67(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(b) (2006), "is jurisdictional and mandatory" in light of the Supreme Court's decision in Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007). 67 M.J. at 116. Bowles held generally that statutory time limits on filings were jurisdictional:

Because Congress decides whether federal courts can hear cases at all, it can also determine when, and

---

[1] In light of our opinion in Rodriguez, the Government raised the jurisdictional issue before the United States Navy-Marine Corps Court of Criminal Appeals (CCA), but the CCA correctly noted that it was "constrained to exercise jurisdiction to consider the appellant's petition by the remand of our superior court." United States v. Luke, No. NMCCA 200000481, 2009 CCA LEXIS 270, at *11, 2009 WL 2345124, at *4 (N-M. Ct. Crim. App. July 31, 2009) (unpublished).

under what conditions, federal courts can hear them. Put another way, the notion of "subject-matter" jurisdiction obviously extends to "classes of cases . . . falling within a court's adjudicatory authority," but it is no less "jurisdictional" when Congress prohibits federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment. 551 U.S. at 212-13 (ellipsis in original) (citations and quote marks omitted).

"Federal courts, including courts in the military justice system established under Article I of the Constitution, are courts of limited jurisdiction." United States v. Wuterich, 67 M.J. 63, 70 (C.A.A.F. 2008). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1868), quoted in Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

The exercise of jurisdiction at one stage of a case does not guarantee its continuance. Nor does it mean that we, as a court of limited and purely statutory jurisdiction, may ignore intervening events that affect that jurisdiction, whether federal statutes or Supreme Court decisions. See McCardle, 74 U.S. (7 Wall.) at 514 (holding that Congress may, by statute,

divest the Supreme Court of appellate jurisdiction in a case already before it).

II.

Article 73, UCMJ, 10 U.S.C. § 873 (2006), provides:

> At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

This statute contains precisely the same sort of limit on a particular filing as the Title 28 statutory provisions examined in Bowles and Article 67(b) as construed in Rodriguez. Although the two-year time limit in Article 73 is not expressed in a statute from which this Court's jurisdiction is derived -- Article 67 -- "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." Barnhart v. Peabody Coal Co., 537 U.S. 149, 159 n.6, 123 S. Ct. 748, 154 L. Ed. 2d 653 (2003), quoted in Bowles, 551 U.S. at 210. Article 73 is such a statute.

Under the logic of Rodriguez, I believe that we cannot exercise jurisdiction over the request for a new trial, which was made long after the expiration of the two-year period prescribed in Article 73. Accordingly, I would vacate the grant of review on Issue I and dismiss it for lack of jurisdiction.

III.

The majority insists that it is not reviewing a petition for new trial under Article 73, but merely a "supplemental issue" raised by Appellant "to determine whether the results of Luke's court-martial were reliable in light of newly discovered evidence." United States v. Luke, M.J. (11 n.8) (C.A.A.F. 2011). But as the author of today's majority opinion noted in his dissent in Luke I, considering the supplemental issue outside the statutory scheme set forth in Article 73 represents "a broad extension of the right to a new trial based on newly discovered evidence" that is not supported by our jurisprudence. See 63 M.J. at 64 (Erdmann, J., dissenting).

"Petitions for new trials are disfavored in the law . . . ." United States v. Harris, 61 M.J. 391, 394 (C.A.A.F. 2005). Congress established strict ground rules concerning petitions for new trial; they must be filed with the Judge Advocate General within two years of the convening authority's approval of the sentence, and only on the grounds of newly discovered evidence or fraud on the court. Article 73, UCMJ. Such petitions are only referred to a military appellate court if the case is pending at the court

when the petition is filed with the Judge Advocate General. Had Appellant filed a petition with the Judge Advocate General, it would have been denied as untimely and would not have been referred to this Court.

To escape the inevitable denial of his petition for new trial as being untimely filed, Appellant successfully circumvented the procedures established by Congress for petitions for new trials by calling this a supplemental issue. The majority opinion tries to distinguish between the two but then resolves the issue by employing the framework of Rule for Court-Martial (R.C.M.) 1210(f)(2), which "sets forth the grounds for granting a new trial based on newly discovered evidence." Luke, M.J. at (11-12). But calling it a supplemental issue, rather than a petition for new trial, doesn't make it so. If it looks like a petition for new trial and the Court employs the President's framework for reviewing petitions for new trial, it probably is a petition for new trial.

By judicial fiat, we have enlarged our jurisdiction to permit any accused to file a petition for new trial directly to this Court while the case is on direct appeal. If Congress had meant that result, it would have said so in Article 67 or Article 73.

In her concurring opinion, Judge Ryan states that "the filing time limit set forth in Article 73 and R.C.M. 1210 is more akin to a statute of limitations" than a jurisdictional filing deadline, and governs when a petitioner has a right to file rather than

when courts are permitted to take appeals. United States v. Luke, M.J. (2 n.1) (Ryan, J., concurring) (citing Eberhart v. United States, 546 U.S. 12, 19, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005); Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)). I disagree. Unlike the claims-processing rules in Eberhart (Fed. R. Crim. P. 33) and Kontrick (Fed. R. Bank. P. 4004, 9006), Article 73 is a statutory limitation much like those in Bowles and Rodriguez, which were determined to be jurisdictional.

EFFRON, Chief Judge (dissenting):

Post-trial information concerning an expert forensic witness for the prosecution at Appellant's court-martial revealed that the expert had been suspended from his Government position as a forensic examiner. This suspension, which ultimately led to the expert's resignation, resulted from a Government investigation conducted several years after Appellant's trial that demonstrated misconduct and deficiencies in the performance of his forensic duties sufficient to warrant disciplinary action. The case before us addresses the impact of the post-trial information on the validity of Appellant's conviction.

1. Background

The Navy charged Appellant, a hospital corpsman, with indecent assault of a patient, Seaman Recruit TN. The parties agreed at trial as to the underlying

circumstances leading up to the charged offense. In the course of his duties, Appellant had examined Fireman A, who was involved in a sexual relationship with Seaman Recruit TN, to address the possibility that Fireman A was afflicted with a sexually transmitted disease. The sexual relationship between Seaman Recruit TN and Fireman A violated a shipboard order prohibiting dating among shipmates. Following the examination of Fireman A, Seaman Recruit TN visited the medical facility as well.

2. The testimony of the complainant and Appellant

The parties at trial offered substantially different versions as to what happened next. Seaman Recruit TN testified that Appellant examined her to determine whether she had a sexually transmitted disease, and sexually assaulted her during the course of the examination. Appellant, who denied the allegation, testified that Seaman Recruit TN visited the medical spaces after his examination of Fireman A. He stated that she was upset and agitated, and soon left the area. He also stated that he did not conduct a medical examination of Seaman Recruit TN and did not otherwise touch her in an inappropriate manner.

3. The opposing theories of the case

At trial, the two parties presented diametrically opposed theories of the case. According to the

prosecution, Appellant took advantage of Seaman Recruit TN's vulnerability and manipulated the circumstances to transform a medical examination into an opportunity for sexual gratification. According to the defense, Seaman Recruit TN and her boyfriend, Fireman A, feared that Appellant would disclose their prohibited relationship, and concocted the charges to divert attention from their own misconduct.

4. Expert testimony

The case did not involve any third party eyewitnesses to the charged misconduct. Each party presented circumstantial evidence supporting that party's theory of the case, as well as circumstantial evidence countering the theory of the opposing party. The prosecution offered expert testimony from two Government employees on the results of DNA testing of both bedding from the medical compartment and undergarments identified by Seaman Recruit TN as those worn by her at the time of the charged incident. Phillip Mills, a forensic chemist at the United States Army Criminal Investigative Laboratory (USACIL), testified about his serology examination of the bedding and articles of clothing. His testimony described his handling of the physical evidence, the nature of the tests he performed, and his identification of stains indicating the presence of bodily fluids.

Mills testified that he transmitted the stains to another USACIL employee, Marilyn Chase, for DNA

analysis. Chase testified about her DNA examination, and expressed her conclusion that the testing indicated that the stains transmitted by Mills showed the presence of DNA consistent with that of Appellant's DNA.

5. The court-martial findings and initial review

The court-martial found Appellant guilty of the charged indecent assaults. On February 22, 1999, the court-martial adjudged a sentence that included confinement for two years and a bad-conduct discharge.

The case was docketed at the Navy-Marine Corps Court of Criminal Appeals on May 8, 2000. The Court of Criminal Appeals completed its review on September 28, 2004, at which time it affirmed the findings and sentence.

6. Forensic misconduct

Appellant subsequently filed an appeal with our Court. While that appeal was pending, USACIL issued a memorandum on August 25, 2005, alerting all staff judge advocates that a USACIL DNA examiner had been suspended "after permitting contamination in his testing process."

In a subsequent memorandum, issued on October 17, 2005, USACIL identified the examiner as Phillip Mills, and listed a number of problems with his

work, including incidents in which he "cross-contaminated and/or switched samples," "altered documentary evidence," "entered false data regarding a control sample," "admitted to making a false data entry and creating a false document," and "misrepresented he examined evidence when he had not." The reliability of the trial results in Appellant's court-martial, in light of the information about Mills, has been addressed in subsequent factfinding and appellate proceedings. See United States v. Luke, 63 M.J. 60, 63 (C.A.A.F. 2006); United States v. Luke, 65 M.J. 5 (C.A.A.F. 2007); United States v. Luke, No. NMCCA 200000481, 2009 CCA LEXIS 270, 2009 WL 2345124 (N-M. Ct. Crim. App. July 31, 2009) (unpublished).

Following discovery of the deficiencies in the testing process due to Mills's misconduct, USACIL asked law enforcement agencies to return the physical evidence in the cases he had handled so that USACIL could conduct new testing. The Naval Criminal Investigative Service reported that it had destroyed the evidence in Appellant's case prior to receiving the request from USACIL. As a result, the physical evidence relied upon by the court-martial to convict Appellant was not available for retesting during the subsequent factfinding proceedings.
The evidence received in the factfinding proceedings confirmed information about Mills's misconduct as a forensic examiner. The evidence confirmed that Mills, among other things, allowed "samples to contaminate one another," "did not follow proper testing procedures," on at least one occasion

"attempted to cover up his mistake by making a false data entry," and "had significant problems with the DNA analysis process, which calls into question the forensic reliability of the results of his DNA casework." The evidence also demonstrated that contamination of the physical evidence could occur during the serology portion of the testing, thereby undermining the validity of the subsequent DNA testing.

The factfinding hearings identified the period of Mills's most serious misconduct as taking place while he was a DNA examiner, a period that occurred several years after his work in Appellant's case as a serology examiner. In that light, and in view of the testimony about the physical evidence, testing process, and lack of motive for falsification, the military judge conducting the factfinding hearing concluded that there had been no contamination or false testimony with respect to Appellant's DNA. The military judge noted, however, that the physical evidence had been destroyed, and that contamination can occur during the serology portion of the testing process.

7. Discussion

The majority affirms the findings of the court-martial, relying on the standard set forth in United States v. Brooks, 49 M.J. 64, 69 (C.A.A.F. 1998) (requiring an evaluation of "whether the newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would

probably produce a substantially more favorable result for the accused") (citation and quotation marks omitted). If Brooks provided the sole governing principle, I would agree with the majority. In the present case, however, we must also take into consideration Mesarosh v. United States, 352 U.S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956), which applies when post-trial information so discredits the credibility of a principal government witness that it undermines the integrity of the judicial process.

The Supreme Court distinguished the circumstances in Mesarosh from the normal treatment of a new trial request involving newly discovered evidence. Id. at 9. In Mesarosh, the government identified information that impugned the credibility of a witness in unrelated proceedings. The Supreme Court concluded that in such a case the credibility of important government witnesses implicates the "integrity of . . . criminal trial[s] in the federal courts," and held that the "dignity of the United States Government will not permit the conviction of any person on tainted testimony." Id. at 3, 9.

During the proceedings before the Supreme Court in Mesarosh, the government had suggested that the case should be returned to the district court to assess whether the newly discovered evidence in fact warranted a new trial. Id. at 8-9. The Supreme Court rejected that approach, and instead set aside the conviction. Id. at 9, 14. The Court concluded that because "the original finder of fact was a jury," only a "jury can determine what it would do on a different

body of evidence." Id. at 12. The principles promulgated by the Court in Mesarosh have since been utilized in similar situations by other federal courts. See, e.g); United States v. Polisi, 416 F.2d 573 (2d Cir. 1969).

In the case before us, Mills -- a Government employee -- was interjected into the case by the Government to participate in its investigation. He played a vital role in the examination of Appellant's forensic evidence. Mills was the first USACIL examiner to come into contact with the evidence at issue, and he repeatedly interacted with the evidence during the course of his serological examination. Specifically, Mills removed the evidence for examination, visually inspected it for stains, cut out the areas of suspected stain with scissors, placed these materials in sterile test tubes for storage, and forwarded these tubes to Chase for DNA analysis.

The Government's investigation established Mills's history of cross-contamination, violation of laboratory protocols, "incomplete and incompetent" analysis as a DNA examiner, and "thoroughness issues" as a serology examiner, all of which underscore the potential for contamination of Appellant's evidence in the present case. The Government subsequently destroyed the physical evidence at issue, thereby precluding the type of retesting that might have restored some level of confidence in the process. In this context, the evidence of Mills's misconduct undermines the integrity of Appellant's verdict. Because "the original

finder of fact" was a court-martial panel, only a new panel "can determine what it would do on a different body of evidence." Mesarosh, 352 U.S. at 12. Accordingly, I respectfully dissent from the majority's decision to affirm the findings and sentence.

UNITED STATES OF AMERICA v. IVOR G. LUKE, HOSPITAL CORPSMAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 200000481

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

July 31, 2009, Decided

NOTICE: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GENERAL COURT-MARTIAL.

Sentence Adjudged: 22 February 1999.

Military Judge: Capt C.A. Porter, JAGC, USN.

Convening Authority: Commander, Naval Base Hawaii, Pearl Harbor, HI.

Staff Judge Advocate's Recommendation: LT K.D. Phillips, JAGC, USN; SJAR Addendum: LCDR R.W. Ridgway, JAGC, USN.

COUNSEL: For Appellant: Capt Sridhar Kaza, USMC.

For Appellee: LCDR Paul Bunge, JAGC, USN.

JUDGES: Before D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM, Appellate Military Judges. Chief Judge O'TOOLE and Judge MAKSYM concur.

OPINION

OPINION OF THE COURT

COUCH, Senior Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of two specifications of indecent assault in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for two years and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

This case is now before us for a third time. In our initial consideration of this case, we affirmed the findings and the sentence and found no error materially prejudicial to the substantial rights of the appellant. United States v. Luke, No. 200000481, 2004 CCA LEXIS 218, unpublished op. (N.M.Ct.Crim.App. 28 Sep 2004). On 25 August 2005, following the Court of Appeals for the Armed Forces' (CAAF) grant of the appellant's petition for review but before adjudication of that appeal, the United States Army Criminal Investigation

Laboratory (USACIL) issued a memorandum to all staff judge advocates stating that a forensic chemist, Mr. Phillip Mills, had been suspended from DNA casework due to his improper practices as an examiner on USACIL's staff. United States v. Luke, 63 M.J. 60, 61-62 (C.A.A.F. 2006). Because Mr. Mills had worked on the appellant's case and testified for the Government, the appellant alleged that the results of his trial were unreliable in view of the newly discovered evidence relating to DNA analysis. Id. at 63 (citing United States v. Murphy, 50 M.J. 4, 15-16 (C.A.A.F. 1998)). On 7 April 2006, CAAF ordered an evidentiary hearing in accordance with United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967), be conducted to determine whether the DNA analysis in the appellant's case was contaminated or the test results otherwise falsified. Id. Even though CAAF deferred its consideration of the issues raised in the appellant's original petition, the court set aside our first decision in this case, returned the record of trial to the Judge Advocate General of the Navy for submission to an appropriate convening authority to conduct the DuBay hearing, and directed that the record then be returned directly to CAAF for further Article 67, UCMJ, review. Id.

A DuBay hearing was conducted on 2 and 8 June 2006, from which the military judge made findings of fact and submitted those findings to our superior court. First DuBay Hearing Record at 1, 112. On 9 March 2007, CAAF remanded this case to us for further consideration in light of the findings in the

DuBay hearing. United States v. Luke, 65 M.J. 5 (C.A.A.F. 2007) (summary disposition). During the first DuBay hearing, the military judge determined that USACIL was conducting an internal investigation including a review and assessment of all of Mr. Mills' prior work. At the time the first DuBay was concluded, this investigation was expected to be completed by September 2006. First DuBay Hearing Record at 136-37. In May 2008, we returned the record to the Judge Advocate General for remand to an appropriate convening authority for another DuBay hearing to, inter alia, determine the status of USACIL's internal investigation into Mr. Mills' serology[1] work. United States v. Luke, No. 200000481, unpublished op. (N.M.Ct.Crim.App. 27 May 2008). On 8 August 2008, a second DuBay hearing was held, and on 28 October 2008 this court was provided a copy of the final USACIL investigation relating to Mr. Mills. Second DuBay Hearing Record at 1.

The appellant now alleges that his conviction cannot be affirmed in light of newly discovered evidence revealed by USACIL's investigation.[2] Appellant's Brief on Supplemental Issue of 24 Nov 2008 at 1. The appellant also alleges that he has been denied his

---

[1] Serology analysis involves the identification and preparation of stains to determine whether genetic material exists that can be used for further DNA analysis. First Dubay Hearing Record at 269-71.

[2] We previously addressed the USACIL investigation into Mr. Mills' work in United States v. Carlson, 67 M.J. 693 (N.M.Ct.Crim.App. 2009).

right to speedy post-trial processing of his case, due to the amount of time the Government has taken to complete the USACIL investigation. Id. at 16. Having considered the record of trial, the results of both DuBay hearings, the excellent pleadings of both the Government and the appellant on the supplemental issue, and the final USACIL report regarding Mr. Mills' case work, we conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was convicted of the indecent assault of a shipmate, Seaman Recruit N (SR N), while performing a "medical examination" as a Hospital Corpsman aboard the USS PORT ROYAL (CG 73). In addition to the testimony of SR N, the Government sought to corroborate the evidence against the appellant at trial by introducing forensic evidence that DNA consistent with the appellant and SR N was found on the bra cup worn by SR N and the bed sheet upon which SR N lay at the time of the assault.

The DNA analysis presented at the appellant's trial was conducted by USACIL. Mr. Mills was the forensic chemist tasked to perform the serological analysis of the bra and the sheet in the appellant's case. Record at 585. Examination revealed two stains

on the bed sheet, one of which contained amylase[3], and one stain on the bra containing amylase. Id. at 589, 593. Mr. Mills forwarded the one stain from the sheet and the stain from the bra to Ms. Marilyn Chase, another USACIL forensic chemist, for DNA analysis. Id. at 591, 594. In addition to those items, Ms. Chase's analysis extended to SR N's underwear, swab samples from the wall adjacent to the bed, and blood samples from the appellant, SR N, and Fireman A (FN A), who was SR N's boyfriend at the time of the alleged offense. Id. at 632, 644, 645. Ms. Chase's analysis concluded that the DNA profile present in the sheet stain was a mixture of the DNA profiles of the appellant and SR N. Id. at 630. The analysis of the bra stain showed a DNA profile consistent with a mixture of the appellant's, SR N's, and FN A's DNA. Id. at 632. Both Mr. Mills and Ms. Chase testified at the appellant's trial. Id. at 580, 618.

Following the appellant's conviction in 1999, USACIL discovered deficiencies in the work of Mr. Mills as a DNA Examiner, a position he advanced to within USACIL after the appellant's conviction. First DuBay Hearing Record at 124. Specifically, in December of 2003, Mr. Mills was found to have contaminated DNA samples during a DNA analysis. Id. at 124. As a result of this incident, Mr. Mills was suspended from his position at USACIL from January to September of 2004. Id. at 129. Upon discovery of two instances of Mr. Mills falsifying data

[3]Amylase is an enzyme found in bodily fluids, including saliva and vaginal secretions. Record at 584.

in 2005, Mr. Mills was indefinitely suspended from USACIL on 3 June 2005 and subsequently resigned his position in lieu of being fired. Id. at 122, 132-136.

Based upon the discrepancies revealed in Mr. Mills' DNA analysis, in April of 2005 USACIL ordered a formal retrospective review of all of Mr. Mills' work at USACIL since 1995. Second DuBay Hearing Record at 73. In order to accomplish that review, USACIL contacted all staff judge advocates of the military branches and law enforcement agencies that submitted evidence during the relevant period, requesting that any evidence examined by Mr. Mills be returned to USACIL for reexamination. Id. Over the course of the USACIL review, it was determined that Mr. Mills had worked on 463 cases during the relevant period. Id. at 108. Physical evidence was returned to USACIL by the submitting agencies in 77 of those cases and re-examination occurred on 59 of the 77 cases.[4] Id. at 108-09. None of the evidence originally tested by USACIL in the appellant's case was returned or retested as it was destroyed by the Naval Criminal Investigative Service (NCIS) prior to the issuance of USACIL's notification. Id. at 117.

The USACIL review focused on whether, and to what extent, Mr. Mills engaged in protocol violations and

---

[4]According to USACIL officials, the disparity between the number of cases with physical evidence available for retesting and the number of cases actually re-tested was the result of a "legal review" in which it was determined which cases would be re-examined. Second Dubay Hearing Record at 97.

false documentation.[5] Appellant's 22 Oct 2002 Motion to Attach the USACIL Quality Manager's Final Report - Mr. Phillip Morris, DNA Examiner's Misconduct (USACIL Final Report) of 30 Sep 2008 at 9. Included in the USACIL review was an examination of Mr. Mills' serological analysis work. Id. at 22. The review concluded that Mr. Mills had multiple protocol violations during DNA analysis in 2001, 2002, and 2003, and had falsified data on a case he worked on in 2005. Id. at 10. The review also determined that Mr. Mills had contaminated a DNA analysis in 2003 through "sample switching and/or tube to tube contamination." Id. at 9. As for discrepancies in Mr. Mills' serological analysis, the review found that Mr. Mills' major flaw was a failure to locate stains. Second DuBay Hearing Record at 60. In that the physical evidence related to the appellant's case had been destroyed, there was no ability for USACIL to retest Mr. Mills' serological analysis. Id. at 80, 117. However, a review of Mr. Mills' portion of the appellant's case file did not reveal "any obvious or blatant discrepancies." Id. at 118. While an outside scientist contracted by USACIL to review Mr. Mills' work, Dr. Schuler, opined that Mr. Mills exhibited "intellectual

---

[5]Mr. Mills was also the subject of a Standards of Conduct Office (SOCO) investigation in October 2005. USACIL Final Report at 4. The SOCO inquiry concluded that Mr. Mills twice falsified data regarding his work and on one occasion violated standards designed to protect against contamination. Id. A separate SOCO inquiry later determined that the USACIL DNA Branch Chief, Mr. Smetana, was derelict in his duties in connection with his failure to report samples improperly retained by Mr. Mills following DNA analysis. Id.

dishonesty," his opinion was based upon his finding that Mr. Mills "rushed cases" when conducting his analysis. Id. at 28, 29. The USACIL investigation revealed no evidence that Mr. Mills falsified any serology data in this or any other case.

Discussion

The issue before us in this case is closely related to that recently decided by us in United States v. Carlson, 67 M.J. 693 (N.M.Ct.Crim.App. 2009). Like Carlson, Mr. Mills conducted serology analysis of DNA evidence used by the Government to corroborate the testimony of a victim in a sexual assault case, and the appellant challenged his conviction, in part, as a result of the USACIL investigation of Mills' conduct. Unlike Carlson, the issue of Mr. Mills' participation in this case was not raised until after another panel of this court had already conducted an Article 66, UCMJ, review, and affirmed the appellant's conviction.

As a predicate matter, we note that the Government challenges this court's jurisdictional basis for considering the appellant's assigned error because the appellant failed to petition the Judge Advocate General for a new trial within the statutory timeline set forth in Article 73, UCMJ, and by RULE FOR COURTS-MARTIAL 1210, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). Government's Brief on Supplemental Issue of 7 Jan 2009 at 2. The Government's position is consistent with the concept that, in a system with statute-based

jurisdictional limitations like courts-martial, "courts have no authority to create equitable exceptions to jurisdictional requirements" such as the two-year time limit imposed on petitions for a new trial under R.C.M. 1210(a). Cf. United States v. Rodriguez, 67 M.J. 110, 113 (C.A.A.F. 2009)(quoting Bowles v. Russell, 551 U.S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007)).

However, under the circumstances of this case, we are constrained to exercise jurisdiction to consider the appellant's petition by the remand of our superior court. Luke, 63 M.J. at 63. We are confident that CAAF's remand effectively rejects the jurisdictional bar to our consideration of the appellant's supplemental assigned error, including his assertion of untimely post-trial delay. Id.; see also United States v. Harris, 61 M.J. 391 (C.A.A.F. 2005).[6] Even if we agreed with the Government that we lack jurisdiction under R.C.M. 1210(a), the appellant could still obtain review from this court by restyling his petition as one seeking a writ of error coram nobis. See United States v. Denedo, 129 S. Ct. 2213, 2222, 173 L. Ed. 2d 1235 (2009). Furthermore, given that CAAF has vacated this court's prior decision, we are again in the position of reviewing

---

[6]Acknowledging that when new evidence is discovered after the Court of Criminal Appeals has concluded its review under Article 66, UCMJ, notwithstanding the expiration of the Article 73 time period to petition for a new trial, a remand to the Court of Criminal Appeals allows "that court to apply its fact-finding authority to the new evidence, an opportunity not previously provided to it." Harris, 61 M.J. at 397.

this case under Article 66, UCMJ. In light of the procedural posture of this case and the clear remand of CAAF, we conclude that we have jurisdiction.

R.C.M. 1210 provides "a clear rule for testing whether the result obtained in the court-martial proceeding is a reliable result" when assessing newly discovered evidence. United States v. Murphy, 50 M.J. 4, 15 (C.A.A.F. 1998). This rule requires that we examine the record, and in this case the records of the multiple DuBay hearings, to determine whether:

[t]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused. Id. at 14 (quoting R.C.M. 1210(f)).

Requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored; relief is granted only if manifest injustice would result absent a new trial, rehearing, or reopening based on proffered newly discovered evidence. United States v. Johnson, 61 M.J. 195, 199 (C.A.A.F. 2005).

Our inquiry is narrowly focused to "further consideration in light of the findings of the Dubay hearing." Luke, 65 M.J. at 5. This inquiry must logically consider whether the fact of Mr. Mills' conduct, when viewed within the context of his participation in the appellant's case, would "make a

more favorable result probable" for the appellant. United States v. Brooks, 49 M.J. 64, 69 (C.A.A.F. 1998). We are mindful that "new evidence which is merely cumulative or impeaching is not . . . an adequate basis for the grant of a new trial." United States v. Thomas, 11 M.J. 135, 138 (C.M.A. 1981)(quoting Mesarosh v. United States, 352 U.S. 1, 9, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956)(internal quotation marks omitted)). Newly discovered evidence "only becomes an adequate basis for a new trial when it relates directly to a material issue" Carlson, 2009 CCA LEXIS 112 at *9 (citing United States v. Williams, 37 M.J. 352, 357 (C.M.A. 1993), and courts will not view such evidence through a prism of "far-reaching speculation concerning the probable impact of newly discovered evidence," Williams, 37 M.J. at 360.

A. Findings of Fact

Having reviewed the entire record, including both DuBay hearings, we conclude that the judges' findings of fact in both hearings are supported by the record. We, therefore, adopt them as our own.

B. DNA Analysis Deficiencies

The facts elicited both during the USACIL review of Mr. Mills' work and during the DuBay hearings demonstrate that Mr. Mills' DNA analysis while at USACIL suffered from a number of errors. Notwithstanding the seriousness of these errors, as

appropriately commented on by the military judge during the second DuBay hearing, Second DuBay Hearing Record at 66, there is no evidence that Mr. Mills had any involvement in the appellant's case beyond the serological analysis. Mr. Mills's first instance of DNA analysis contamination occurred four years after the appellant's conviction.[7] Moreover, the distinct complexity of DNA analysis from that of serology is worthy of observation. See Carlson, 2009 CCA LEXIS 112 at *14. As a result, the evidence relating to deficiencies in Mr. Mills's DNA analysis would be of limited probative value in assessing the accuracy of his serological examination in the appellant's case and, albeit potential impeachment evidence, would not "probably produce a substantially more favorable result for the accused." R.C.M. 1210(f)(2)(C).

C. Serology Analysis Deficiencies

As previously noted, the USACIL review of Mr. Mills' work, although primarily focused on his work as a DNA examiner, also considered the reliability of his serology analysis. We acknowledge that any new evidence regarding deficiencies in Mr. Mills' serology work is potentially more pertinent to the appellant's case given Mr. Mills' role in the serology analysis.

---

[7]While not dispositive, we note that the closeness in time of alleged misconduct is a factor in assessing the probative value of that misconduct. See United States v. James, 63 M.J. 217, 221 (C.A.A.F. 2006)(stating that "the fact that someone acts in a particular manner does not mean that they have always acted in that manner, or for that matter that they always will").

USACIL's review of Mr. Mills' serological work included retests of samples of evidence in cases on which Mr. Mills worked as a serology examiner. USACIL Final Report at 22. Those retests did expose gaps in Mr. Mills' work that could be attributed to Mr. Mills' failure to identify stains in his serology examinations, and failure to consider all probative evidence as a result of his apparent penchant for rushing cases.[8] Id. at 23; Second DuBay Hearing Record at 29. Nonetheless, USACIL's review concluded that any differences in the results of Mr. Mills' original test and the retest could also be attributed to degradation of the samples tested, insufficient portions of the samples remaining to adequately test, and alternate light source models used for the screening of evidence by Mr. Mills and the retest examiners. USACIL Final Report at 23.

---

[8]An example of this tendency by Mr. Mills occurred in this case. After oral swabs of the appellant's mouth were taken by NCIS, the appellant expressed concern to his officer-in-charge, a medical doctor, that the oral swab would contain "Surgilube," a medical lubricant. Record at 572. The appellant explained that after he encountered SR N in the medical spaces, he went to the back room of the clinic, used Surgilube to masturbate, then fell asleep while sucking his thumb. Id. at 571. SR N testified that the appellant had provided her Surgilube to lubricate her vagina before he penetrated her with his fingers, and before he placed his mouth on her vagina. Id. at 361-64. Despite a request by the NCIS case agent to test the appellant's oral swabs for Surgilube, Defense Exhibit A at 2, Mr. Mills testified that he did not perform any testing to find Surgilube, id. at 600-01, nor is there any indication in the record that he tested the oral swabs of the appellant at all. The discovery of Surgilube on the appellant's oral swab would have been consistent with SR N's allegation of oral sodomy, an offense of which the members acquitted the appellant.

To be sure, the USACIL review of Mr. Mills' serology work demonstrates a possible lack of proficiency in identifying stains. The report on Mr. Mills' work, however, includes no finding of specific instances of contamination or falsification of serology results. Nor does the report or record of either DuBay hearing relate any evidence of deficient serology examination by Mr. Mills in the appellant's case for the samples he processed.[9] If this new data of Mr. Mills' work were admissible, it would be admissible as impeachment evidence, used to attack the credibility of Mr. Mills' work while he was employed at USACIL as a serologist.[10] Moreover, assuming that this new evidence was admitted, we are convinced that any impeachment value rendered from this new evidence is insufficient to "make a more favorable result

---

[9] Ms. Glidewell, lead biologist at USACIL and formerly a lead forensic scientist in the fields of serology and DNA, testified at the first DuBay hearing in this case that, having read every page of Mr. Mills' serology report in the appellant's case, her professional assessment was that there were no technical anomalies in how Mr. Mills handled his examination. First DuBay Hearing Record at 282.

[10] We note that, at trial, the defense counsel questioned both Mr. Mills and Ms. Chase regarding the quality assurance measures taken at USACIL to ensure accuracy of results. Record at 585, 626. In fact, the defense counsel did attempt to impeach Mr. Mills' testimony regarding what items were screened during the serology examination and forwarded on for DNA analysis. Id. at 606-07. The evidence gleaned from the USACIL report would merely be relevant to buttress any impeachment of USACIL's and Mr. Mills' procedures without more in the way of specific deficiencies relating to the appellant's case.

probable." Brooks, 49 M.J. at 69. Relevant in this regard is the strength of the Government's case independent of the forensic evidence relied upon at trial. See Carlson, 2009 CCA LEXIS 112 at *23.

D. Strength of Government's Case

We are persuaded that the Government presented a sufficiently convincing case at trial that, irrespective of the forensic evidence, proves the appellant's guilt beyond a reasonable doubt by legal and competent evidence. SR N's testimony regarding the collateral events of the alleged indecent assault was corroborated by her boyfriend, FN A, and by an impartial bystander, FN M. Record at 441, 461. Particularly convincing was SR N's almost immediate report to the ship's Command Duty Officer (CDO) of the assault, at risk to her own career given the nature of her relationship with FN A as a violation of a ship anti-dating policy, and FN A's apparent emotional reaction to learning of the alleged assault. Id. at 349, 367, 443. Additionally, FN A testified that the appellant advised FN A that he should conduct a medical examination of SR N because he had diagnosed FN A with a sexually transmitted disease. Id. at 456. The Government presented testimony from the appellant's supervisor that he was not qualified to conduct such an examination and had been explicitly instructed against doing so. Id. at 561-62. Moreover, the appellant's apparent pretext for the examination of SR N, that FN A had a sexually-transmitted disease, was rebutted by the Government through FN A's

testimony that he was later determined not to be infected. Id. at 462-63.

After weighing the strength of the Government's case, the marginal nature of the defense case, and the limited probative value of the new impeachment evidence of Mr. Mills as it relates to Ms. Chase's DNA testing, we conclude that the additional impeachment evidence regarding Mr. Mills would not have probably influenced the fact finder to render a substantially more favorable result, even if they had completely disregarded the forensic evidence. Harris, 61 M.J. at 397; United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999); Carlson, 2009 CCA LEXIS 112 at *27. While we clearly recognize the significant negative impact of Mr. Mills' misconduct upon the reputation of USACIL as a forensic laboratory, we note that his deficiencies were discovered primarily in his performance as a DNA analyst, years after his serology work in the appellant's case occurred. As we determined in Carlson, the simple assertion that "Mr. Mills cannot be trusted," standing alone, provides insufficient logic for us to conclude that the forensic evidence in the appellant's case is per se not credible. Carlson, 2009 CCA LEXIS 112 at *20. In the absence of sufficient evidence to conclude that Mr. Mills contaminated the appellant's DNA samples, or otherwise falsified pertinent test results in his analysis related to the appellant's case, we can find no grounds to set aside the findings of guilty.

E. Post-Trial Delay

The appellant asserts that he has been denied his right to the speedy post-trial processing of his case, due to the amount of time the Government has taken to complete the USACIL investigation. He further asserts that this has led to prejudice, because the forensic evidence in his case has been destroyed and is no longer available for retesting.

In light of United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), we will assume, without deciding, that the appellant was denied his due process right to speedy post-trial review and appeal. However, based on the totality of the circumstances, we conclude that the appellant has not suffered any specific prejudice as a result of the delay. Primary among the circumstances is that the appellant has not prevailed on any meritorious issue that would require retrial. As a result, the appellant's ability to defend himself at such a retrial has not been compromised by the unavailability of the forensic evidence. Second, we again note that the appellant raised the potential for cross-contamination at trial, whereupon Ms. Chase testified that she specifically tested for cross-contamination and found none. Record at 626, 656, 665. Third, this record contains no direct evidence that contradicts Ms. Chase's testimony or compromises the integrity of her DNA testing in this case. We conclude that any assertion or implication that the forensic evidence, if available for retesting, would lead to additional evidence favorable to the appellant is speculation. We, therefore, hold that any due process violation that

may have occurred in processing this case was harmless beyond a reasonable doubt. United States v. Allende, 66 M.J. 142, 145 (C.A.A.F. 2008).

We have also examined the issue of post-trial delay in this case pursuant to the authority contained in Article 66(c), UCMJ, the guidance in Toohey v. United States, 60 M.J. 100, 101-02 (C.A.A.F. 2004); United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002); and the factors we articulated in United States v. Brown, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). Again, after examining the totality of circumstances, we conclude that the delay in completing our second review of this case was principally related to the time USACIL required to complete their inquiry. As is abundantly clear from the record, this was a complex, expensive, and technically laborious undertaking. The process suffered from a number of setbacks, including unresponsive contractors and dereliction of duty by a supervisory staff member. We conclude on this record that USACIL had substantial motives to properly investigate this matter, and ultimately succeeded in doing so in good faith. As we are confident that the vigilance of the courts in enforcing their orders has allowed the appellant a full and fair opportunity to present his case on appeal, we conclude that the delay in this case has no affect on the findings and sentence that should be approved.

F. Original Assignments of Error

We have considered the appellant's original assignments of error anew, including the two issues that were later granted review by CAAF.[11] Luke, 63. M.J. at 61 n.1. For the reasons set forth in the prior opinion of this court, we conclude that none of them have merit. United States v. Reed, 54 M.J. 37, 42 (C.A.A.F. 2000)(citing United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)); see also United States v. Webb, 66 M.J. 89 (C.A.A.F. 2008)(Government discovery obligation); United States v. Banker, 60 M.J. 216 (C.A.A.F. 2004)(evidence of victim's prior sexual history); United States v. Gonzalez, 62 M.J. 303 (C.A.A.F. 2006)(rebuttal evidence); United States v. Moran, 65 M.J. 178 (C.A.A.F. 2007)(improper argument); Allison, 63 M.J. at 365 (expert opinion evidence); and United States v. Beatty, 64 M.J. 456 (C.A.A.F. 2007)(factual sufficiency).

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed. Chief Judge O'TOOLE and Judge MAKSYM concur.

---

[11] I. WHETHER THE LOWER COURT ERRED WHEN IT UPHELD THE TRIAL JUDGE'S EXCLUSION, DURING CROSS-EXAMINATION, OF AN ALLEGED VICTIM'S ABORTION AFTER IT BECAME RELEVANT AND MATERIAL REBUTTAL TO THE VICTIM'S TESTIMONY. II. WHETHER THE LOWER COURT ERRED WHEN IT UPHELD THE GOVERNMENT'S FAILURE TO DISCLOSE EVIDENCE THAT IT HAD PREPARED TO USE ON RE-DIRECT EXAMINATION OF A GOVERNMENT WITNESS.

UNITED STATES, Appellee, v. Ivor G. LUKE, Hospital Corpsman Second Class, U.S. Navy, Appellant

No. 05-0157

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

63 M.J. 60; 2006 CAAF LEXIS 427

September 22, 2005; February 7, 2006, Argued
April 7, 2006, Decided

PRIOR HISTORY: Crim. App. No. 200000481. Military Judge: Charles A. Porter.
United States v. Luke, 2004 CCA LEXIS 218 (N-M.C.C.A., Sept. 28, 2004)

COUNSEL: For Appellant: Captain Peter H. Griesch, USMC (argued); Captain James D. Valentine, USMC (on brief).

For Appellee: Major Wilbur Lee, USMC (argued); Commander Charles N. Purnell II, JAGC, USN (on brief); Lieutenant Colonel William K. Lietzau, USMC.

Amicus Curiae: Christopher A. Turtzo (law student)(argued); Shaun P. Martin, Esq. (professor)

(on brief) - the University of San Diego School of Law at the September 22, 2005, oral argument.

JUDGES: EFFRON, J., delivered the opinion of the Court, in which GIERKE, C.J., and CRAWFORD and BAKER, JJ., joined. ERDMANN, J., filed a dissenting opinion.

OPINION BY: EFFRON

OPINION

Judge EFFRON delivered the opinion of the Court.

At a general court-martial composed of officer and enlisted members, Appellant was convicted, contrary to his pleas, of two specifications of indecent assault, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2000). He was sentenced to a bad-conduct discharge and confinement for two years. The convening authority approved these results, and the United States Navy-Marine Corps Court of Criminal Appeals affirmed in an unpublished opinion. United States v. Luke, No. NMCCA 200000481, 2004 CCA LEXIS 218, 2004 WL 2187577 (N-M. Ct. Crim. App. Sept. 28, 2004).

On Appellant's petition, we granted review and held oral argument on two issues.[1]

---

[1] I. WHETHER THE LOWER COURT ERRED WHEN IT UPHELD THE TRIAL JUDGE'S EXCLUSION, DURING

Subsequently, we granted review of the following supplemental issue:

WHETHER APPELLANT'S CONVICTION CAN BE AFFIRMED BY THIS COURT IN LIGHT OF THE FACT THAT EVIDENCE OF FRAUDULENT TESTING OF DNA HAS BEEN NEWLY DISCOVERED.

We heard argument on these two issues on September 22, 2005, at the University of San Diego School of Law in San Diego, California, as part of this Court's "Project Outreach." See United States v. Mahoney, 58 M.J. 346, 347 n.1 (C.A.A.F. 2003). For the reasons set forth below, we hold that Appellant has brought forth sufficient evidence to warrant further inquiry under United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967), as to whether a Government forensic examiner contaminated Appellant's DNA sample or otherwise falsified pertinent test results. In view of our disposition on the supplemental issue, it would be premature to address the first two granted issues at this time.

I. FACTS

CROSS-EXAMINATION, OF AN ALLEGED VICTIM'S ABORTION AFTER IT BECAME RELEVANT AND MATERIAL REBUTTAL TO THE VICTIM'S TESTIMONY. II. WHETHER THE LOWER COURT ERRED WHEN IT UPHELD THE GOVERNMENT'S FAILURE TO DISCLOSE EVIDENCE THAT IT HAD PREPARED TO USE ON RE-DIRECT EXAMINATION OF A GOVERNMENT WITNESS.

A. BACKGROUND

Appellant served as a hospital corpsman aboard the USS PORT ROYAL. Appellant was charged with indecently assaulting a female shipmate, Seaman Recruit N. The chain of events leading to the charged offense began when Seaman Recruit N's boyfriend, Fireman A, sought medical treatment from Appellant for a stomach pain. Appellant, in the course of examining Fireman A, noticed a skin rash on Fireman A. During a discussion about possible causes of the rash, Fireman A told Appellant that he was in a sexual relationship with Seaman Recruit N.

Seaman Recruit N testified that she went to the ship's medical spaces later that day because Appellant told her that she needed to be examined for a sexually transmitted disease. According to Seaman Recruit N, Appellant directed her into a back room, where he had her lie on a bed. She stated that Appellant, under the guise of performing a medical examination, sexually assaulted her.

Appellant's testimony provided a different version of what happened after Fireman A revealed his relationship with Seaman Recruit N. According to Appellant, he informed Fireman A that he would have to report the relationship to the command. Fireman A tried to dissuade Appellant from making a report and then left the medical spaces. Appellant stated that Seaman Recruit N later arrived at the medical spaces because she was looking for Fireman A. According to Appellant, she went into the back

room of the medical spaces, and then emerged teary-eyed and stated that she was tired of the Navy and was ready to get out. Appellant testified that she then left the medical spaces and that he went to sleep on the bed in the back room.

Seaman Recruit N and Fireman A both testified about the ship's policy prohibiting relationships with other members of the ship's company. Each stated that they knew at the time of the charged incident that the relationship was in violation of the policy.

B. DNA EVIDENCE PRESENTED AT TRIAL

In addition to the testimony of Fireman A and Seaman Recruit N, the Government relied upon DNA evidence to convict Appellant. Naval Criminal Investigative Service agents collected the bra that Seaman Recruit N wore on the day of the alleged assault and a bed sheet from the bed where the alleged assault took place. Both were sent to the United States Army Criminal Investigation Laboratory (USACIL) at Fort Gillem, Georgia, for analysis.

Mr. Phillip Mills, then a forensic chemist at USACIL, Fort Gillem, Georgia, testified for the prosecution. Mr. Mills explained that he examined the bed sheet and the bra for stains that contained saliva. He stated that each contained cells from which DNA could be obtained, so a portion of each

was preserved for another examiner who would perform DNA tests.

The forensic chemist who examined the DNA also testified for the prosecution. She stated that the DNA on the sheet and bra was consistent with a mixture of DNA taken from blood samples of Appellant and Seaman Recruit N. The prosecution also introduced an expert in statistical genetics to interpret the DNA evidence. The expert testified regarding the likelihood that the DNA was from Appellant and Seaman Recruit N, as compared to unknown individuals.

C. POST-TRIAL DEVELOPMENTS

On August 25, 2005, over six years after Appellant's court-martial and one month prior to the oral argument on the two issues originally granted by this Court, USACIL at Fort Gillem, Georgia, issued a memorandum to all staff judge advocates. The memorandum stated in pertinent part:

2. In April 2005, an internal quality control review detected a suspected false entry made by a DNA examiner that made the test invalid. The examiner was suspended from his DNA casework on 3 May 2005. In an inquiry initiated on 2 June 2005, the examiner admitted the false entry.

3. In January 2004, the same examiner was suspended from DNA casework after permitting

contamination in his testing process. After retraining, he was returned to casework on 13 September 2004, initially working one case at a time under supervision.

The memorandum contained an attachment that listed the cases in which the examiner performed tests. The list included Appellant's case.

On October 17, 2005, USACIL at Fort Gillem, Georgia, issued another memorandum to all staff judge advocates detailing improper practices of the examiner. The memorandum stated, in pertinent part:

2. In December 2003, Mr. Phillip R. Mills, a USACIL Forensic DNA Examiner, cross-contaminated and/or switched samples within and between the following cases . . . .

3. Consequently, Mr. Phillip R. Mills, a USACIL Forensic DNA Examiner, was suspended from performing DNA case work from January 2004 through September 2004.

4. In April 2005, Mr. Phillip R. Mills, a USACIL Forensic DNA Examiner, altered documentary evidence in USACIL case number . . . .

5. In April 2005, Mr. Phillip R. Mills, a USACIL Forensic DNA Examiner, entered false data regarding a control sample in USACIL case number . . .

6. Mr. Phillip R. Mills, a USACIL Forensic DNA Examiner, was suspended from performing forensic DNA analysis at USACIL on 3 May 2005; however, he remained an USACIL employee.

7. Mr. Phillip R. Mills, a USACIL Forensic DNA Examiner, admitted to making a false data entry and creating a false document in USACIL case number . . . in a written statement made on 2 June 2005.

8. On 9 June 2005, Mr. Phillip R. Mills, a USACIL Forensic DNA Examiner, wrote a memorandum response to the technical review findings in USACIL case number . . .; therein, he misrepresented he had examined evidence when he had not.

9. Mr. Phillip R. Mills, a USACIL Forensic DNA Examiner, in USACIL case number . . ., examined only a single swab which had been submitted for evidence along with additional swabs. On 13 April 2005, Mr. Mills represented he had examined evidence and found negative results. Mr. Mills had not examined all available evidence. The evidence in USACIL case number . . ., when tested by another a USACIL Forensic DNA Examiner, yielded positive DNA results.

The forensic examiner whose activities were described in this memorandum was the same examiner who testified about the saliva tests and

presence of DNA in the bed sheet and bra for the Government at Appellant's court-martial.

II. ANALYSIS

The supplemental issue asks whether Appellant's conviction can be affirmed in light of the newly discovered evidence regarding DNA testing at the laboratory that tested Appellant's DNA, which included problems of cross-contamination, misrepresentation, false data entries, and analytical deficiencies. The critical question is whether the results of trial are reliable in view of the newly discovered evidence. See United States v. Murphy, 50 M.J. 4, 15-16 (C.A.A.F. 1998).

The defense has identified two memoranda issued by the laboratory detailing improper practices by Mr. Mills. At trial, Mr. Mills testified that he performed saliva tests on the bed sheet and bra and that the evidentiary samples of DNA collected from the items came from the stains he examined. DNA testing involves comparing an evidentiary sample with a known sample. Mr. Mills' testimony revealed he had access to the evidentiary samples tested in Appellant's case. This access could have provided Mr. Mills with the opportunity to engage in the improper practices described in the USACIL memoranda, such as cross-contamination, alteration of evidence, and entry of false data -- matters that could have a direct bearing on the reliability of the findings.

The Government has not challenged the defense position that Mr. Mills had access to and participated in testing the samples from which DNA was extracted in Appellant's case. The Government contends that Appellant is not entitled to relief because the memoranda do not conclude that Mr. Mills' testing was flawed in Appellant's case -- only in subsequent, unrelated cases.

Whether Mr. Mills engaged in the improper activities detailed in the memoranda in Appellant's case is a factual question that this Court is not in a position to resolve. At this stage, Appellant has demonstrated that there are material questions of fact that could give rise to relief in the context of his case. See Murphy, 50 M.J. at 16. Appellant's showing that Mr. Mills is known to have been involved in such behavior and that Mr. Mills had access to the evidentiary samples tested in Appellant's case is sufficient to trigger an evidentiary hearing into whether Appellant's sample was contaminated or the test results were otherwise falsified.

III. DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for submission to an appropriate convening authority for a fact-finding hearing on Appellant's claim of contamination of his DNA sample and falsification of his test results. See Du-Bay, 17 C.M.A. at 149, 37 C.M.R. at 412. In light of

the potential implications for other cases involving the same Government examiner, we urge completion of the DuBay hearing within ninety days of the issuance of this opinion, if practicable. Thereafter, the record will be returned directly to this Court for further review in accordance with Article 67, UCMJ, 10 U.S.C. § 867 (2000).

DISSENT BY: ERDMANN

DISSENT

ERDMANN, Judge (dissenting):

The majority concludes that the post-trial materials relating to Mr. Mills' alleged misconduct raise material questions of fact that could give rise to relief and that further inquiry is warranted. As I find that the circumstances of this case do not warrant extending the period within which to seek a new trial on the basis of newly discovered evidence, I do not agree that a factfinding hearing under United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967), is warranted. I therefore respectfully dissent.

In the context of a petition for new trial under Article 73, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 873 (2000), a petitioner has two years after the convening authority takes action within which to bring a petition for new trial based on newly discovered evidence. Since the new evidence in Luke's case did not come to light until almost five

years and five months after the convening authority's action, this new evidence does not support a petition for new trial under Article 73, UCMJ.

Luke argues that despite this statutory language, a motion for a new trial based on newly discovered evidence may be bought if a case is in the course of appeal, relying on United States v. Harris, 61 M.J. 391 (C.A.A.F. 2005), and United States v. Murphy, 50 M.J. 4 (C.A.A.F. 1998).[1] Murphy was a capital case in which Murphy sought a new trial based on newly discovered expert scientific evidence bearing on his mental responsibility. 50 M.J. at 13-14. Despite the fact that this evidence arose well after the two-year time period under Article 73, UCMJ, this court applied the Rule for Courts-Martial (R.C.M.) 1210(f)(2) new trial analysis to his request for a new trial. Id. at 15. We did so because it was a capital case calling for this court to carefully scrutinize the case for "reliability of result." Id. at 14.[2] Capital litigation is unquestionably different and the need to assure a reliable result warrants different treatment. See Ring v. Arizona, 536 U.S.

---

[1]Luke asserts that the test to be applied in this circumstance is the same test as set forth in Rule of Courts-Martial 1210(f)(2) for a petition for new trial based on newly discovered evidence under Article 73, UCMJ.N

[2]In addition, "mental responsibility" occupies a preferred position in military jurisprudence. See United States v. Massey, 27 M.J. 371, 373 (C.M.A. 1989); United States v. Jacks, 8 C.M.A. 574, 577, 25 C.M.R. 78, 81 (1958); Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence app. 22 at A22-7 (2005 ed.).

584, 605-06, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) ("There is no doubt that 'death is different'."); Loving v. United States, 62 M.J. 235, 236 (C.A.A.F. 2005); United States v. Curtis, 32 M.J. 252, 255 (C.M.A. 1991).

Harris, on the other hand, does not support the proposition that R.C.M. 1210(f)(2) should be applied beyond the two-year Article 73, UCMJ, period. Although dealing with evidence of mental responsibility discovered after trial, Harris actually filed a petition for new trial within two years of the convening authority's action. 61 M.J. at 394.[3]

I do not find that either Murphy or Harris support a broad extension of the right to a new trial based on newly discovered evidence simply because a case remains in appellate channels more than two years after the convening authority's action. Nor does this case present the compelling circumstances that we faced in Murphy. In this non-capital case the new evidence of Mr. Mills' misconduct could at most be offered under Military Rule of Evidence 608(b) to impeach his trial testimony. This is not evidence rising to the level of a defense as does evidence of lack of mental responsibility. See R.C.M. 916(k).

---

[3] Even though Harris did file a timely petition for new trial, I am open to the possibility of applying the new trial analysis in non-capital cases where the proffered new evidence goes to the reliability of the findings of guilt rather than the credibility of a witness.

I would hold that a DuBay hearing is not appropriate and would proceed to consideration of the remaining issues in this case.